















Digitized by the Internet Archive  
in 2016





## THE

REPORTS OF CASES DECIDED IN THE QUEEN'S  
BENCH, CHANCERY, AND COMMON  
PLEAS DIVISIONS

HIGH COURT OF JUSTICE FOR ONTARIO,

WITH A TABLE OF THE NAMES OF CASES ARGUED,

JAMES F. SMITH, Q. C.

QUEEN'S BENCH DIVISION.....	S. J. VANKOUGHNET, Q.C.
CHANCERY DIVISION . . . . .	{ A. H. F. LEFROY,
	{ GEORGE A. BOOMER,
COMMON PLEAS DIVISION . . . . .	GEORGE F. HARMAN.

TORONTO:

KING STREET EAST.

1888.

ENTERED according to Act of Parliament of Canada, in the year of our Lord  
one thousand eight hundred and eighty-eight, by THE LAW SOCIETY OF UPPER  
CANADA, in the Office of the Minister of Agriculture.



J U D G E S  
OF THE  
HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

---

QUEEN'S BENCH DIVISION :

HON. SIR ADAM WILSON, KNT., C. J.  
" JOHN DOUGLAS ARMOUR, J.  
" JOHN O'CONNOR, J.

CHANCERY DIVISION :

HON. JOHN ALEXANDER BOYD, C.  
" WILLIAM PROUDFOOT, J.  
" THOMAS FERGUSON, J.  
" THOMAS ROBERTSON, J.

COMMON PLEAS DIVISION :

HON. SIR MATTHEW CROOKS CAMERON, KNT., C.J.  
" THOMAS GALT, J.  
" JOHN E. ROSE, J.

---

*Attorney-General :*

HON. OLIVER MOWAT.





# A T A B L E

OF THE

## CASES REPORTED IN THIS VOLUME.

A.	Page.	Page.
Ambrose v. Fraser et al. ....	551	Canadian Pacific R.W. Co., The, The Ontario and Sault Ste. Marie R. W. Co. v. .... 432
Alexander et al. v. The Corpor- ation of the Township of Howard. ....	22	Carr v. The Fire Assurance Association ..... 487
Artkin, Green and, Re. ....	697	Carroll et al., Mays v. .... 699
Ayers v. The Corporation of the Town of Windsor. ....	682	Cathedral of the Holy Trinity, The, v. The West Ontario R. W. Co. .... 246
B.		Clark and the Union Fire Ins. Co., Re (2). .... 618
Ballard v. Stovel et al. ....	153	Clark et al., In re, and The Corporation of the Town- ship of Howard ..... 598
Bate v. The Canadian Pacific R. W. Co. ....	625	Clarkson v. Sterling ..... 460
Beam et al. v. Merner ....	412	Clayton v. McConnell. .... 608
Bishop et al., McGregor v. ....	7	Coates v. Coates ..... 195
Bolt and Iron Co., Re. ....	211	Collins, Regina v. .... 613
Brierly, Regina v. ....	525	Cooley et al., Ryan v. .... 13
Bruce, The Corporation of the County of, McLay v. ....	398	Copeland et al., Canadian Lo- comotive Co., The, v. .... 170
Bull v. The North British Can- adian Investment Co., and The Imperial Fire Ins. Co..	322	Corporation of the County of Bruce, The, McLay v. .... 398
C.		Corporation of the Township of Howard, The, Alexander v. . 22
Cameron v. Cameron. ....	561	Corporation of the Township of Howard, The, Clark et al., and 598
Canadian Bank of Commerce v. Northwood. ....	207	Corporation of the City of Stratford, The, Pratt v. .... 260
Canadian Locomotive Co., The, v. Copeland et al. ....	170	Corporation of the Township of West Nissouri, The, v. The Corporation of the Township of North Dorchester ..... 294
Canadian Pacific R. W. Co., The, Bate v. ....	625	

	Page.	G.	Page.
Corporation of the Town of Windsor, The, Ayers v. ....	682	Gill v. Gilmour et al. ....	129
Corporation of the Township of North Dorchester, The, The Corporation of the Township of West Nissouri, v. ....	294	Gilmour and White, Re. ....	694
Corporation of the County of Frontenac, The, The License Commissioners for the License District of Frontenac, v. ....	741	Gilmour et al., Gill v. ....	129
Cowan, Dominion Bank, The v. ....	465	Glennie, Struthers v. ....	726
Cox v. Hamilton Sewer Pipe Co. ....	300	Gooderham & Worts (Limited), Mooers v. ....	451
		Graham v. The Ontario Mutual Ins. Co. ....	358
		Green and Artkin, Re. ....	697
		Grough et al., Stuart v. ....	255
		H.	
D.		Hague, Re. ....	660
Dean v. The Ontario Cotton Mills Co. ....	119	Hall, Re. ....	557
Dennis, Re. ....	267	Hamilton Sewer Pipe Co., Cox v. ....	300
Dennis, Downey v. ....	219	Henderson v. Killey et al. ....	137
Defoe et al., Macgregor et ux. v. ....	87	Herchmer v. Elliott et al. ....	714
Dickson v. Monteith et al. ....	719	Hobson, Pegg v. ....	272
Dominion Bank, The, v. Cowan ....	465	Hope, Norman et al. v. ....	287
Dominion Loan and Investment Co., The, v. Kilroy. ....	468	Howard, The Corporation of the Township of, Clark et al. and Howard, The Corporation of the Township of, Alexander et al. v. ....	598
Donohoe, The United States Express Co. v. ....	333		22
Downey v. Dennis. ....	219		
Duchenault et al., O'Donnell v. ....	1	I.	
Dunham et al., Standard Bank v. ....	67	Iron Co., Bolt and, Re. ....	211
Dunning, Regina v. ....	52		
Durnion, Regina v. ....	672		
		K.	
E.		Kane, McGee v. ....	226
Elliott et al., Herchmer v. ....	714	Killey et al., Henderson v. ....	137
		Keenan et al., McDermott et al. v. ....	687
F.		Kilroy, The, Dominion Loan and Investment Co., v. ....	468
Fair, Smith v. ....	729	Kleopfer & Walker, Warnock et al. v. ....	288
Fire Assurance Association, The Carr v. ....	487	Konkle, Re. ....	183
Fowlie, Winfield v. ....	102		
Fraser et al., Ambrose v. ....	551		
Frontenac, The License Commissioners for the License District of, v. The Corporation of the County of Frontenac. ....	741	L.	
		Lewis and Thorne, Re. ....	133
		Lindop, Wells (2) v. ....	275

Page.			
License Commissioners for the License District of Frontenac, The, v. The Corporation of the County of Frontenac ..		O.	
	741		Page.
M.		O'Donnell v. Duchenuault et al.	1
Macgregor et ux. v. Defoe et al.	87	Ontario Bank, The, Saderquist v.	586
Maxwell et al., Parker v. ....	239	Ontario Cotton Mills, The, Dean v. ....	119
Mays v. Carroll et al. ....	699	Ontario Mutual Insurance Co., The, Graham v. ....	358
Merner, Beam et al., v. ....	412	Ontario and Sault Ste. Marie R. W. Co., The, v. The Cana- dian Pacific R. W. Co. ....	432
Monteith et al., Dickson v. ....	719	P.	
Montreal, The Bank of, v. Stewart .....	482	Parker v. Maxwell et al. ....	239
Mooers et al. v. Gooderham & S.	451	Pegg v. Hobson .....	272
Worts (Limited) .....	451	Pratt v. The Corporation of the City of Stratford .....	260
Mc.		R.	
McAuley, Regina v. ....	643	Reddick v. The Saugeen Mutual Fire Ins. Co. ....	506
McCaskill v. Rodd .....	282	Reeve v. Thompson et al. ....	499
McConnell, Clayton et al, v..	608	Regina v. Brierly .....	525
McDermott et al. v. Keenan et al. ....	687	Regina v. Collins .....	613
McGee v. Kane .....	226	Regina v. Dunning .....	52
McGregor v. Bishop et al. ....	7	Regina v. Durnion .....	672
McIntosh v. Rogers .....	97	Regina v. McAulay .....	643
McIntosh, McPhail v. ....	312	Regina v. Sproule .....	375
McLay v. The Corporation of the County of Bruce .....	398	Regina v. Wright .....	668
McPhail v. McIntosh .....	312	Rodd, McCaskill v. ....	282
N.		Rogers, McIntosh v. ....	97
Norman et al. v. Hope .....	287	Ross v. Williamson .....	184
North Dorchester, The Cor- poration of the Township of, The Corporation of the Town- ship of West Nissouri v. ....	294	Ryan v. Cooley et al. ....	13
North British Canadian Invest- ment Co., The, and The Im- perial Fire Ins. Co., Bull v..	322	Rykert v. Wilson .....	188
Northern R. W. Co., Wells v..	594	S.	
Northwood, The Canadian Bank of Commerce v. ....	207	Saderquist v. The Ontario Bank	586
		Saugeen Mutual Fire Ins. Co., The, Reddick v. ....	506
		Sproule, Regina v. ....	375
		Smith v. Fair .....	729
		Standard Bank, The, v. Dunham et al. ....	67

	Page.	W.	Page.
Sterling, Clarkson v. ....	460	Warnock et al. v. Kleopfer & Walker .....	288
Stevens, Re. ....	707	Watson and Woods, Re. ....	48
Stewart, The Bank of Montreal, v. ....	482	Weir, In re .....	389
Stovel et al., Ballard v. ....	153	Wells v. Lindop (2) .....	275
Stratford, The Corporation of the City of, Pratt v. ....	260	Wells v. The Northern R. W. Co. ....	594
Struthers v. Glennie .....	726	West Nissouri, The Corporation of the Township of, v. The Corporation of the Township of North Dorchester. ....	294
Stuart v. Grough et al. ....	255	West Ontario R. W. Co., The, The Cathedral of Holy Trinity v. ....	246
T.		White, Gilmour and, Re. ....	694
Thompson, Reeve v. ....	499	Whitehead v. Whitehead ....	621
Thorne, Lewis and, Re .....	133	Wilson v. Rykert .....	188
U.		Williamson, Ross v. ....	184
Union Fire Ins. Co., The, Clark and, Re (2) .....	618	Winfield v. Fowlie .....	102
United States Express, The, Co. v. Donohoe .....	333	Windsor, The Corporation of the Town of, Ayers v. ....	682
		Woods, Watson and, Re. ....	48
		Wright, Regina v. ....	668

---



# A TABLE

## OF THE

### CASES CITED IN THIS VOLUME.

---

#### A.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Abrath v. North Eastern R. W. Co.....	11 App. Cas. 247, 252. 401, 409, 411,	524
Acheson v. Hodges .....	3 Ir. Eq. R. 522 .....	258
Adam, Re .....	1 Moo. P. C. 460.....	533
Adams v. Corporation of Toronto.....	12 O.R. 243 .....	261, 262, 265
Adams v. Loomis .....	24 Gr. 242.....	183
Adanson Fibre Co., Re.....	L. R. 9 Ch. 635 .....	77
Adie v. Clark .....	3 Ch. D. 134.....	428
Aguilar v. Aguilar .....	5 <sup>th</sup> Mad. 414 .....	554
Agricultural Investment Co. v. Federal Bank .....	45 U. C. R. 214, 6 A. R. 192.....	716
Alexander v. Crystal Palace R. W. Co .....	30 Beav. 556 .....	249, 251
Alford v. Vickery .....	1 Car. & M. 280.....	90
Allen v. McPherson .....	1 H. L. 191 .....	723
Anderson v. Muskoka Mill and Lumber Co. ....	27 C. P. 180 .....	240
Andrew v. White .....	18 U. C. R. 170.....	534
Anglo Co-operative Society, Re.....	W. R. 1882, 126.....	215
Anglo-French Co-operative Society, Re Ex parte Pelley .....	21 Ch. D. 492 .....	215, 216
Anglo Swiss Condensed Milk Co v. Metcalf .....	31 Ch. D. 454 .....	730
Arbens Application, Re.....	35 Ch. D. 248. ....	730
Arden v. Arden .....	29 Ch. D. 702 .....	269
Arnold v. Cheque Bank .....	1 C. P. D. 578 .....	593, 716
Ashworth v. Outram .....	5 Ch. D. 923 .....	473
Atwood v. Sellar.....	4 Q. B. D. 342, 5 Q. B. D. 286..	175, 178
Atwood v. Small.....	6 Cl. Fin. 232.....	563, 568, 581, 582
Attorney General v. Bradlaugh.....	14 Q. B. D. 667.....	61
Attorney General v. Great Eastern R. W. Co.....	L. R. 7 Ch. 475, 482; 6 H. L. 367 .....	435, 446
Attorney General v. Mayor &c. of Liverpool .....	1 My. & Cr. 171 .....	174, 224
Attorney General v. Stilwell .....	1 Y. & C. Ex. 571 .....	100
Austerberry v. Corporation of Oldland..	29 Ch. D. 750.....	552
Ayer v. Hawkins .....	19 Verm. 26 .....	191

#### B.

Babcock and Brooks, Re .....	9 U. C. L. J. 185.....	256
Baddeley v. Baddeley.....	9 Ch. D. 113 .....	622
Bain v. Fothergill .....	L. R. 7 H. L. 207.....	524

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Barnes v. Wood .....	L. R. 8 Eq. 424 .....	202
Baker v. Charlton .....	Peakes N. P. C. 111 .....	77, 82
Baker v. Dawbarn .....	19 Gr. 113 .....	663
Bank of Upper Canada v. Thomas .....	2 E. & A. 502 .....	233
Barber, Re .....	34 L. J. N. S. Bank 1 .....	490
Barber v. Meyerstein .....	L. R. 2 C. P. 38 .....	181
Bardon v. Bardon .....	16 Ir. Ch. 415 .....	132
Barker v. Cox .....	4 Ch. D. 464 .....	202
Barkshire v. Grubb .....	18 Ch. D. 616 .....	117
Barnes v. Southsea R. W. Co. ....	27 Ch. D. 536 .....	249
Barnfather v. Jordan .....	2 Doug. 451 .....	554
Baron de Bodes Case .....	8 Q. B. 208 .....	537
Barr v. Gibson .....	3 M. & W. 390 .....	454
Barsalow v. Darling .....	9 S. C. R. 677 .....	730
Bartels v. Bartels .....	42 U. C. R. 22 .....	49
Barter v. Howland .....	26 Gr. 135 .....	422
Barton v. Bucknill .....	13 O. B. 393 .....	64
Baxendale v. Bennett .....	3 Q. B. D. 525 .....	592, 716
Bellamy and Metropolitan Board of Works	24 Ch. D. 387 .....	718
Benner v. Currie .....	36 U. C. R. 411 .....	214
Bennett v. Beyes .....	5 H. & N. 391 .....	90
Bennett v. Robins .....	5 C. & P. 379 .....	256
Benson v. Ottawa Agricultural Ins. Co.	42 U. C. R. 282 .....	365, 366
Berliner Brauerei Gesellschaft Tivoli v. Knight .....	W. N. 1883, p. 70 .....	736, 739
Bernard v. Coutellier .....	45 U. C. R. 453 .....	349
Berrie v. Wood .....	12 O. R. 693 .....	552
Berrington v. Evans .....	1 Y. & C. Ex. 434 .....	728
Berry v. Zeiss .....	32 C. P. 231 .....	473
Biggs v. Peacock .....	20 Ch. D. 200, 22 Ch. D. 284, 31 W. R. 148 .....	269, 270
Bird v. Adams .....	7 Georgia 505, 508 .....	191
Bird v. Harris .....	L. R. 9 Eq. 204 .....	166
Bird v. Luckie .....	8 Ha. 301 .....	700, 705
Blagden v. Bennett .....	9 O. R. 593 .....	402
Blake v. Beech .....	1 Ex. D. 320 .....	680
Bliss v. Collins .....	5 B. & Al. 871 .....	502, 503
Blockley, Re .....	29 Ch. D. 250 .....	559
Boaler v. Mayor .....	19 C. B. N. S. 76 .....	209
Booth v. Briscoe .....	2 Q. B. D. 496 .....	25
Borough v. Philcox .....	5 My. & Cr. 73 .....	321
Borthwick v. Young .....	12 A. R. 671 .. 451, 452, 453, 454, 455	455
Bonell Re .....	L. R. 1 P. D. 69 .....	529
Boughton v. Knight .....	L. R. 3 P. & D. 64 .....	157
Boulton v. Burke .....	9 O. R. 80 .....	191
Boulton v. Crowther .....	2 B. & C. 710 .....	263
Boyd v. Allen .....	48 L. T. N. S. 628, 24 Ch. D. 622 ..	269
Braid v. Great Western R. W. Co. ....	10 C. P. 137 .....	628, 642
Breton's Estate, Re .....	17 Ch. D. 416 .....	624
Bristow v. Sequeville .....	5 Ex. 275 .....	529
Broadhurst v. Moins .....	2 B. & Ad. 1 .....	319
Brook v. Briggs .....	2 Bing. N. C. 572 .....	553
Brooke v. Bank of Upper Canada .....	4 P. R. 162 .....	435
Brooke v. Stone .....	34 L. J. N. S. Ch. 251 .....	490
Brooklyn Steam Transit Co v. Brooklyn.	78 N. Y. 524 .....	435
Brooklyn Winfield and Newton R. W. Co., Re .....	72 N. Y. 245 .....	435
Brown, Re .....	6 A. R. 386 .....	396
Brown v. Higgs .....	8 Ves. 574, 708 .....	316, 317, 319

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Brownlie v. Campbell .....	5 App. Cas. 925 .....	580, 585
Brownlow v. Metropolitan Board of Works	16 C. B. N. S. 546 .....	402
Bruce v. Bruce .....	L. R. 11 Eq. 371 .....	690
Bryson v. Ontario and Quebec R. W. Co.	8 O. R. 380 .....	183
Buchanan v. Town of Galt .....	12 C. P. 75 .....	263
Bullock v. Downes .....	9 H. L. C. 1 .....	700, 705
Burgess v. Wheate .....	1 Eden. 251 .....	552
Burn v. Boulton .....	2 C. B. 476 .....	190
Burnham v. Galt .....	16 Gr. 419 .....	273
Burrough v. Moss .....	10 B. & C. 558 .....	10
Burrough v. Philcox .....	5 My. & Cr. 92 .....	312
Burrows v. Leavens .....	29 Gr. 475 .....	716
Burrowes v. Lock .....	10 Ves. 470 .....	562
Burt v. Burt .....	2 Sw. & Tr. 88, 29 L. J. P. & M. 133 .....	527, 528, 549
Bushell v. Pocock .....	53 L. T. N. S. 860 .....	202
Butler v. Standard Ins. Co. ....	26 Gr. 341 .....	518
C.		
Cahill v. Cahill .....	8 App. Cas. 420 .....	553
Callisher v. Bischoffsheim .....	L. R. 5 Q. B. 449 .....	12
Calvert v. Black .....	8 P. R. 255 .....	664
Cameron v. Brooke .....	15 Gr. 693 .....	202
Campbell v. Cole .....	7 O. R. 127 .....	473, 478
Campbell v. Lepan .....	19 C. P. 31 .....	256
Campbell v. McKerricher .....	6 O. R. 85 .....	202
Canada Atlantic R. W. Co. v. Corporation of Ottawa .....	8 O. R. 183 .....	201
Canada Permanent Building Society v. Wallis .....	8 Gr. 368 .....	99, 100
Canada Publishing Co. v. Gage .....	11 S. C. R. 306 .....	730
Candler v. Candler .....	Jac. 232 .....	539
Canniff v. Bogart .....	6 C. P. 477 .....	5
Carr v. London and North Western R. W. Co .....	L. R. 10 C. P. 307, 318 .....	716
Carter v. Drysdale .....	12 Q. B. D. 91 .....	309
Carter v. Whalley .....	1 B. & Ad. 11, 12 .....	77
Cartwright v. Cartwright .....	26 W. R. 684 .....	529
Cass v. Wood .....	30 L. T. N. S. 970 .....	269
Casselman v. Hersey .....	32 U. C. R. 333 .....	240
Castellain v. Preston .....	8 Q. B. D. 613, 11 Q. B. D. 380 ..	323
Catherwood v. Caston .....	13 M. & W. 261 .....	529
Cattell v. Ireson .....	E. B. & E. 91 .....	65
Catterall v. Sweetman .....	9 Jur. 951 .....	248
Cattle v. Arnold .....	1 J. & H. 651 .....	502, 503
Candle v. Seymour .....	1 Q. B. 889 .....	380
Chalmers v. Shackell .....	6 C. & P. 475 .....	334
Chamberlain v. Boyd .....	11 Q. B. D. 407 .....	402, 410
Chamberlen v. Clark .....	1 O. R. 135 .....	663
Chambers v. Crickley .....	33 Beav. 374 .....	430
Charles, Re.—Fulton v. Whatmough ..	10 A. R. 281 .....	15
Chatillon v. Canadian Mutual Fire Ins. Co. ....	27 C. P. 450 ... ..	358, 365, 368, 373
China Steamship Co., Re., Ex parte Mc- Kenzie .....	L. R. 7. Eq. 240 .....	215, 218
Citizens Ins. Co. v. Parsons .....	7 App. Cas. 96 .....	619
City of Montreal v. Hall .....	Cassels Dig. of Supreme Court Decisions 280 .....	402

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol
Clark v. Adie .....	L. R. 10 Ch. 667, 33 L. T. N. S. 295, 3 Ch. D. 134, 2 App. Cas. 315, 423, 429, 430, 431	
Clark v. Molyneux.....	3 Q. B. D. 237.....	276
Clark and Union Fire Ins. Co.....	10 O. R. 489 .....	620
Clarke v. Hilton.....	L. R. 2 Eq. 810 .....	168
Clarke v. Holmes .....	6 H. & N. 349, 7 H. & N. 937, 126,	127
Clarke v. Lazarus .....	2 M. & G. 167 .....	10
Clifford v. Koe .....	5 App. Cas. 447 .....	15
Clough v. London and North Western R. W. Co.....	L. R. 7 Ex. 26.....	562, 568
Clouse v. Canada Southern R. W. Co....	4 O. R. 28, 11 A. R. 557, 13 S. C. R. 139 .....	594, 597
Cloyes v. Chapman.....	27 C. P. 30.....	557
Cockburn v. Muskoka Mill and Lum- ber Co. ....	13 O. R. 343 .....	240
Coe and Corporation of Pickering .....	24 U. C. R. 439.....	617
Cole v. West London &c. R. W. Co....	27 Beav. 242 .....	252
Coley, Ex parte ..	15 Jur. 128, 20 L. J. M. C. 168 ..	64
Collings and Harding's Case .....	13 Co. R. 578, Cro. Eliz. 606.....	503
Collins v. Brown.....	3 K. & J. 423 .....	739
Collins v. Cowen.....	3 K. & J. 428 .....	739
Colquhoun and the Town of Berlin, Re..	44 U. C. R. 631 .....	262
Colter v. Thomson .....	27 L. J. N. S. Ex. 305 .....	191
Compton v. Mercantile Ins. Co.....	27 Gr. 334.....	323
Contra Costa Coal Mines R. W. Co. v. Moss .....	23 Cal. 324 .....	434
Cook v. Duckenfield, J.....	2 Atk. 566 .....	164
Cook v. Grant .....	32 C. P. 511 .....	349
Cook v. Hutchison.....	1 Keen. 42 .....	165
Cook v. Martin .....	29 Conn. 63 .....	191
Cook v. Wright .....	1 B. & S. 559 .....	12, 202
Cooke v. Chilcote .....	3 Ch. D. 694 .....	552
Cooper v. Slade .....	6 H. L. Cas. 746,.....	334, 347
Corporation of Chatham v. Corporation of Dover .....	5 O. R. 325, 11 A. R. 285, 2 S. C. R. 321.....	24, 42, 43, 44, 294, 296
Corporation of Chatham v. Corporation of Sombra.....	44 U. C. R. 305 .....	296
Corporation of Dover v. Corporation of Chatham .....	11 A. R. 248, 12 S. C. R. 321....	23, 297
Corporation of Essex and Corporation of Rochester.....	42 U. C. R. 523.....	24
Corporation of Folkestone v. Woodward.	L. R. 15 Eq. 159.....	249
Corporation of Romney and Corporation of Mersea... ..	11 A. R. 712 .....	297
Cotton v. Corby .....	7 Gr. 50 .....	434
Coulter v. Smith.....	8 O. R. 536 .....	183
Counhayre, Re .....	L. R. 8 Q. B. 410 .....	395
Couston v. Chapman .....	L. R. Sc. App. 250 .....	453, 454
Cox v. Great Western R. W. Co .....	9 Q. B. D. 106 .....	309
Crepps v. Durden .....	1 Sm. L. C., 8 ed., p. 730.....	680
Croft v. Town Council of Peterborough..	5 C. P. 45, 141 .....	262 263
Crosier v. Tabb .....	38 U. C. R. 54 .....	698
Cross v. Currie .....	43 U. C. R. 599.....	77
Crossfield v. Gould.....	9 A. R. 218 .....	562, 564
Currie v. Hodgson .....	42 U. C. R. 608.....	209
Curties's Trusts, Re.....	L. R. 14 Eq. 217.....	169
Cuthbertson v. Irving .....	4 H. & N. 754 .....	553
Czech v. General Steam Navigation Co..	L. R. 3 C. P. 14 .....	642



## D.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Dacie v. John .....	McClel. 575. ....	258
Dance v. Goldingham .....	L. R. 8 Ch. 912 .....	220
Darnell v. Williams .....	2 Stark 166 .....	10
Davidson v. Douglas .....	15 Gr. 347 .....	291
Davis v. Reid .....	17 Gr. 691 .....	740
Dawson v. Bank of Whitehaven.....	6 Ch. D. 218 .....	664
Day v. Nix .....	9 Moore 159 .....	10
Dean v. Hewitt .....	5 Wend. 257 .....	191
Dearmer, Re .....	53 L. T. N. S. 905 .....	473
Defoe, Re .....	2 O. R. 623 .....	319
Denison v. King .....	16 East 283 .....	164
Dick v. Donald .....	1 Bli. N. R. 655 .....	101
Dickey v. McCaul .....	14 A. R. 166 .....	206
Dickson v. Provincial Ins. Co.....	24 C. P. 157 .....	323
Doan v. Davis .....	23 Gr. 207 .....	663
Dobbie v. McPherson .....	19 Gr. 262 .....	15
Doe d. Borwell v. Abey .....	1 M. & S. 428 .....	156, 169
Doe d. Cheney v. Batten .....	Cowp. 243 .....	90
Doe d. Davies v. Williams .....	1 H. Bl. 25 .....	109
Doe d. Devine v. Wilson .....	10 Moo. P. C. 502, 521 .....	353
Doe v. Langton .....	2 B. & Ad. 680 .....	109
Doe d. Meyrick v. Meyrick .....	2 C. & J. 223 .....	109
Doe d. McIntyre v. McIntyre.....	7 U. C. R. 156 .....	49
Doe d. Newman v. Kensham .....	17 Q. B. 736 .....	5
Doe d. Warner v. Browne .....	8 East. 166 .....	501
Dolan v. Anderson .....	12 Court of Sessions cases, 4th series, 804. ....	309
Dominion Bank v. Blair .....	30 C. P. 591 .....	717
Donald v. Suckling .....	L. R. 1 Q. B. 585 .....	174
Donegani v. Donegani .....	3 Knapp 85 .....	533
Dos Della Khan, Re.....	6 P. D. 6 .....	530
Dougherty v. Carson .....	7 Gr. 31 .....	49
Druitt v. Seaward .....	31 Ch. D. 234.....	701
Duke of Buccleuch v. Metropolitan Board of Works .....	L. R. 5 H. L. 418 .....	380
Dunham, Re. ....	29 Gr. 258 .....	319
Dunkin v. Cockburn .....	13 O. R. 254.....	241, 244
Dinsmore v. Shackleton .....	26 C. P. 604 .....	584
Dymont v. Thompson .....	12 A. R. 659 .....	453

## E.

Earls v. McAlpine .....	6 A. R. 145 .....	49
Edwards v. Edwards .....	15 Beav. 357 .....	708
Edwards v. Harben .....	2 T. R. 587 .....	726
Edwards v. Wickwar .....	L. R. 1 Eq. 68.....	99
Eldorado Union Store Co., Re.....	6 Russ. & Geld. 474 .....	618, 620
Elliott v. Smith .....	22 Ch. D. 236 .....	707, 708, 710
Ellison v. Ellison .....	6 Ves. 656 .....	152
Emmett v. Quinn .....	7 A. R. 306 .....	552
Emperor v. Rolfe .....	1 Ves. Sr. 208 .....	132
Empress Engineering Co.....	16 Ch. D. 290.....	151
English Joint Stock Bank, Re, Ex parte Harding .....	L. R. 3 Eq. 341 .....	214
Evans v. Morley.....	21 U. C. R. 547.....	77
Evans v. Scott .....	1 H. L. Cas. 43 .....	132
Ewbank v. Nutting .....	7 C. B. 797 .....	174
Exchange Banking Co., Re.....	46 L.T.N.S. 474, 51 L.J.N.S. Ch.525	515

## F.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Farrar v. Definne .....	1 C. & K. 580 .....	77
Farrell v. Farrell .....	26 U. C. R. 652 .....	15
Fawcett v. Great Western R. W. Co....	1 Moo. P. C. N. S. 101..	626, 628, 629, 630, 639
Federal Bank v. Northwood .....	7 O. R. 389 ..	77
Fielden v. Ashworth .....	L. R. 20 Eq. 410.....	156
Filman v. Filman .....	15 Gr. 643 .....	558
Fisken v. Brooke .....	8 A. R. 8 .....	134
Fitzgerald v. Gore District Mutual Fire Ins. Co .....	30 U. C. R. 97 .....	323
Fleming v. McDougall .....	27 Gr. 459 .....	312
Forman v. Wright .....	11 C. B. 481 .....	10
Foster v. McKinnon .....	L. R. 4 C. P. 704 .....	77, 716
Fowkes v. Pascoe .....	L. R. 10 Ch. 343.....	158
Fowler v. Garlike .....	1 Russ. & M. 232 .....	157
Fox v. Hawks .....	13 Ch. D. 822 .....	623
Freeman v. Cooke .....	2 Ex. 654 .....	589
Freeman v. Pope .....	L. R. 9 Eq. 205, L. R. 5 Ch. 538..	726, 728
Freeth v. Burr.....	L. R. 9 C. P. 208.....	611
Fuller v. Chamier .....	L. R. 2 Eq. 682 .....	319
Funston and the Corporation of Tilbury East .....	11 O. R. 74.....	26

## G.

Gabriel v. Smith.....	16 Q. B. 847, .....	98
Ganer v. Lady Lanesborough .....	1 Peake N. P. 25 .....	530
Gardiner v. Gray .....	4 Camp. 145 .....	453, 456
Gent v. Cutts .....	11 Q. B. 288 .....	5
George v. Howard .....	7 Pr. 646 .....	166
Gerow v. Clarke .....	9 U. C. R. 219 .....	152
Gibbs v. Great Western R. W. Co.....	12 Q. B. D. 208.....	309
Gibson v. Hammersmith and City R. W. Co. ....	9 Jur. N. S. 221 .....	249
Gilbert v. Doyle.....	24 C. P. 60 .....	90
Gilbert v. Wetherell .....	2 S. & Stu. 254 .....	559
Gilchrist v. Gore District Mutual Fire Ins. Co.....	34 U. C. R. 15.....	323
Gilchrist and Island .....	11 O. R. 537 .....	695, 696, 698
Glass v. Burt .....	8 O. R. 391 .....	624
Goodhall v. Harding ..	52 L. T. N. S. 126 .....	202
Gooderham v. Hutchison .....	5 C. P. 241 .....	77
Goodfellow v. Prince.....	35 Ch. D. 9 .....	730
Gore v. Gibson .....	13 M. & W. 623 .....	77
Gorely, Ex. p. ....	10 Jur. N. S. 1085 .....	493, 496
Goring v. London Mutual Ins. Co.....	10 O. R. 236 .....	517
Gorton v. Gregory .....	3 B. & S. 90 .....	552
Govenors of St. Thomas's Hospital v. Charing Cross R. W. Co.....	1 J. & H. 400 .....	249
Gowland v. Garbutt .....	13 Gr. 584 .....	273
Graham v. London Mutual Fire Ins. Co.	13 O. R. 132 .....	369
Grand Junction R. W. Co. v. County of Peterborough .....	6 A. R. 366 .....	434
Grandy v. Grandy .....	30 Ch. D. 57 .....	152
Gray v. Billington .....	21 C. P. 288 .....	422, 428
Great Western R. W. Co. v. McCarthy.	12 App. Cas. 703 .....	629

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Great Western R. W. Co. v. Rimell ....	18 C. B. 585 .....	524
Green v. London General Omnibus Co ..	29 L. J. C. P. 13, 6 Jur. N. S. 228,	401, 407
Green v. Watson .....	2 O. R. 627 .....	622
Greenpoint Sugar Co. v. Henry Whitin..	69 N. Y. 328 .....	436
Greet v. Citizens Ins. Co .....	27 Gr. 121 .....	491
Gregory v. Doidge .....	3 Bing. 474 .....	553
Gregory v. Williams .....	3 Mer. 582 .....	150, 151
Grey v. Ball.....	23 Gr. 390 .....	486
Grierson v. Chesire Lines Committee....	L. R. 19 Eq. 83 .....	249, 253
Griffin v. Patterson .....	45 U. C. R. 536 .....	183
Griffith v. Griffith .....	29 Gr. 145 .....	15
Griffiths v. London and St. Katherine Docks Co.....	12 Q. B. D. 493 .....	126
Grimshawe v. Grand Trunk R. W. Co..	15 U. C. R. 224.....	250, 254
Grip Printing and Publishing Co. v. Butterfield .....	11 S. C. R. 291 .....	430
Grimoldby v. Wells .....	L. R. 10 C. P. 391 .....	453
Gumm v. Tyrie .....	33 L. J. N. S. Q. B. 67 .....	692
Gundry v. Pinniger .....	1 D. M. & G. 502.....	700, 705
Gwynne v. South Eastern R. W. Co...	18 L. T. N. S. 738 .....	401

## H.

Haldeman v. Haldeman .....	40 Penn. 29 .....	319
Hall v. West .....	Cited in Lindley on Part. 344....	77
Hamilton &c. R. W. Co. and Corporation of Halton &c.....	39 U. C. R. 93 .....	435
Hamilton v. Dennis .....	12 Gr. 325 .....	49
Hanns v. Johnston .....	3 O. R. 100 .....	617
Harding v. Glynn .....	1 Atk. 469, 2 W.&T. L. C., 6th ed., 1077 .....	316, 317, 319
Hare v. Proudfoot .....	6 O. S. 617 .....	505
Harley v. King .....	2 C. M. & R. 18 .....	553
Harnett v. Baker .....	L. R. 20 Eq. 50 .....	99
Harris v. Mallock .....	21 U. C. R. 82.....	497
Harris v. Midland R. W. Co.....	25 W. R. 63 .....	629
Harris, Ex parte, In re Lewis .....	2 Ch. D. 423.....	256, 259
Harris v. Mudie .....	7 A. R. 414 .....	486
Harrison v. Douglas .....	40 U. C. R. 415 .....	473, 474, 478
Hart v. Swaine .....	7 Ch. D. 42....	562, 563, 568, 582, 584
Hastings Mutual Fire Ins. Co. v. Shannon.	2 S. C. R. 394 .....	358, 373
Haywood v. Brunswick Building Society.	8 Q. B. D., 403 .....	552
Healey v. Dolson .....	8 O. R. 691 .....	208
Heard v. Pilley .....	L. R. 4 Ch. 548 .....	202
Hedstrom v. Canada Car Co.....	8 A. R. 631 .....	453
Heilbut v. Hickson .....	L. R. 7 C. P. 451 .....	453
Henderson v. Midland R. W. Co.....	24 L. T. N. S. 881 .....	401, 411
Henderson v. Stevenson .....	L. R. 2 H. L. Sc. 270 .....	630
Hessin v. Bain .....	2 O. R. 332 .....	473
Hill v. Bishop of London .....	1 Atk. 620 .....	162, 166, 167
Hilliard v. Gemnell .....	10 O. R. 504 .....	90
Hillock v. Sutton .....	2 O. R. 548 .....	553
Hills v. Reeves .....	31 W. R. 206, .....	256, 258
Hobart v. Countess of Suffolk.....	2 Vern. 644 .....	165, 167,
Holland, Re.....	37 U. C. R. 214... ..	380, 383
Holloway v. Holloway .....	5 Ves. 399 .....	700, 705
Holton v. Foster .....	L. R. 3 Ch. 505 .....	703
Hooper v. Keay .....	1 Q. B. D. 178.....	191



NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Hopkins, Re., Barnes v. Hopkins .....	8 P. R. 160 .....	662
Hopkins, Re., Dowd v. Hawtin .....	19 Ch. D. 61 .....	256
Horsburg & Co's. Application, Re .....	53 L. J. Ch. 237 .....	730
Howards Trusts .....	7 Ir. Ch. 344 .....	132
Howe v. Thompson .....	11 Maine 252 .....	191
Hoy v. Smythies .....	22 Beav. 510 .....	99
Hughes v. Evans .....	13 Sim. 496 .....	167
Hughes v. Moore .....	11 A. R. 569 .....	716
Hughson v. Cook .....	20 Gr. 238 .....	240
Hunter v. Corbett .....	7 U. C. R. 75 .....	340
Hunters Trusts, Re. ....	L. R. 1 Eq. 295 .....	15
Hyde & Co's. Trade Mark, Re. ....	7, Ch. D. 724 .....	730

## I.

Imhaeuser v. Buerk .....	101 U. S. 647 .....	422
International Contract Co., Re Pickering's Claim .....	L. R. 6 Ch. 525 .....	552
Irvine v. Sullivan .....	L. R. 8 Eq. 673 .....	168
Irving v. Boyd .....	15 Gr. 160 .....	539

## J.

Jackson v. Bowman .....	14 Gr. 156 .....	481
Jacob v. Lawrence .....	4 L. R. (Ir.) C. L. 582 .....	275, 278, 280
James, Re. ....	9 P. R. 88. ....	77
James' Trade-Mark, Re. ....	33 Ch. D. 392 .....	730
Jeffrey v. Scott .....	27 Gr. 314 .....	312, 320
Jenkyn v. Vaughan .....	3 Drew. 419, .....	726
Jenner v. Clegg .....	1 M. & Rob. 213. ....	90
Jenney v. Brook .....	6 Q. B. 323 .....	64
Jessell v. Bath .....	L. R. 2 Ex. 267 .....	692
Johnasson v. Bonhote .....	2 Ch. D. 298 .....	226, 230, 233
Johnson v. Blumenthal .....	3 C. P. D. 32 .....	716
Johnson v. Credit Lyonnais Co. ....	3 C. P. D. 42 .....	593
Johnson v. Gallagher. ....	3 DeG. F. & J. ....	494, 553, 554
Johnston v. Orr Ewing .....	7 App. Cas. 219 .....	730
Joliffe v. Baker .....	11 Q. B. D. 255. ....	563, 568, 582, 583
Jones v. Blake .....	29 Ch. D. 913 .....	220
Jones v. Colbeck .....	8 Ves. 38 .....	701, 705
Jones v. Davies .....	8 Ch. D. 205 .....	162
Jones v. Harris .....	9 Ves. 486. ....	554, 555
Jones v. Just .....	L. R. 3 Q. B. 197. ....	451, 453, 455, 456
Jones v. Victoria Graving Dock Co. ....	2 Q. B. D. 314 .....	202
Jopp v. Wood .....	2 DeG. J. & S. 323. ....	132
Jordan v. Adams .....	6 C. B. N. S. 748 .....	312

## K.

Kay v. Oxley .....	L. R. 10 Q. B. 360 .....	116
Keefer v. McKay .....	29 Gr. 162 .....	15
Kernochan v. New York Bowery Fire Ins. Co. ....	17 N. Y. 428 .....	324
Kerr v. Stripp .....	24 Gr. 198 .....	552
King v. Denison .....	1 V. & B. 272 .....	155
King v. Justices of Cheshire .....	5 B. & Ad. 439 .....	64
King v. Wycombe R. W. Co. ....	28 Beav. 104 .....	249, 250, 253
Knapman v. Wreford .....	18 Ch. D. 300 .....	218

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Kirk v. Blurton .....	9 M. & W. 284 .....	77
Klein v. Union Fire Ins. Co. ....	3 O. R. 234 .....	331, 506, 517, 518

## L.

Laidlaw v. Liverpool & London Ins. Co. .	13 Gr. 377 .....	323
Lambe v. Vice .....	6 M. & W. 467 .....	152
Lane v. Goudge .....	9 Ves. 225 .....	15
Langham v. Sanford .....	17 Ves. 443, 19 Ves. 641 .....	166
Laughton v. Bishop of Sodor and Man. .	L. R. 4 P. C. 495, .....	276, 279
Latta v. Lowry .....	11 O. R. 517 .....	132
Laxton v. Rosenberg .....	11 O. R. 199 .....	90
Lee v. MacMahon .....	11 A. R. 555 .....	562, 569
Lees v. Massey .....	Dale & Lehman's Dig. 496 .....	705
Legg v. Evans .....	6 M. & W. 36 .....	174
Legge v. Croker .....	1 Ball. & B. 106 .....	584
Leicester Club and County Race Course Co., Re., Ex parte Cannon .....	30 Ch. D. 629, .....	214, 215, 216
Leonard v. Watson .....	9 A. & E. 721 .....	534
Leslie v. Preston .....	7 Gr. 434 .....	99, 100
Lester v. Foxcraft .....	1 W. & T. L. C. in Equity, 6th ed., 881 .....	202
Lever v. Goodwin .....	36 Ch. D. 1 .....	730, 737
Levine v. Claffin .....	31 C. P. 600 .....	473, 474
Lewis v. Corporation of Toronto .....	39 U. C. R. 343 .....	263
Leyman v. Latimer .....	3 Ex. D. 15, 352 .....	402, 410
License Commissioners of the North Rid- ing of Norfolk v. Corporation of Norfolk	14 O. R. 741 .....	741, 749
License Commissioner of Prince Edward v. County of Prince Edward .....	26 Gr. 452 .....	741, 744, 749
Lindsay Petroleum Co. v. Pardee .....	22 Gr. 18 .....	435
Lister v. Leather .....	8 E. & B. 1004 .....	429
Little v. Billings .....	27 Gr. 353 .....	312
Llado v. Morgan .....	23 C. P. 517 .....	174
Lloyds v. Harper .....	16 Ch. D. 290 .....	151
London Chatham, and Dover R. W. Co. v. Wandsworth Board of Works .....	L. R. 8 C. P. 189 .....	435, 445
Long v. Blackall .....	3 Ves. 486 .....	705
Longley v. Longley .....	L. R. 13 Eq. 133 .....	161
Lord Robert Grosvenor v. Hampstead Junction R. W. Co .....	1 DeG. & J. 446, 3 Jur. N. S. 1085 .....	248, 251
Low v. Routledge .....	L. R. 1 Ch. 47 .....	534
Lundy Granite Co., Re. Haney Lewis Case .....	26 L. T. N. S. 673 .....	214
Lundy v. Maloney .....	11 C. P. 143 .....	49
Lyndons Trade-Mark .....	32 Ch. D. 109 .....	730
Lyon v. Stadacona Ins. Co .....	44 U. C. R. 472 .....	323

## M.

Macaulay v. Kemp .....	27 Gr. 442 .....	157
Macbeth v. Smart .....	14 Gr. 298 .....	214
Macdonald v. Macdonell .....	19 U. C. R. 130, 2 E. & A. 341 ..	49
Macey v. Metropolitan Board of Works. .	33 L. J. N. S. Ch. 377 .....	266
Maddison v. Alderson .....	8 App. Cas. 467 .....	202, 203
Madever, Re .....	27 Ch. D. 323 .....	727
Magee v. Kane .....	9 O. R. 475 .....	202

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Magee v. Marks .....	11 Ir. C. L. R. 449. ....	351, 353
Magnay v. Edwards .....	13 C. B. 479 .....	552
Magnus v. Queensland National Bank ..	35 W. R. 754.....	592
Maheew v. Forrester .. .....	5 Taunt. 615.....	323
Manchester &c. R. W. Co. v. Brown....	8 App. Cas. 703 .....	629
Mander v. Royal Canadian Bank .....	20 C. P. 129 .....	592
Mansel v. Norton .....	22 Ch. D. 760 .....	552
Mapp v. Elcock .....	2 Ph. 796 .....	166
Marsh v. Earl Granville, Re .. .....	24 Ch. D. 11 .....	99
Marson v. London &c. R. W. Co. ....	L.R. 6 Eq. 101, L.R. 7 Eq. 546..	249, 252, 253
Martin v. Grand Trunk R. W. Co.....	10 A. R. 162 .....	637
Martindale v. Clarkson.....	6 A. R. 1.....	24, 662, 664
Mason v. Agricultural Mutual Ins. Co..	18 C. P. 19.....	519
Mason v. Bickell .....	2 A. R. 291 .....	716
Mason v. Great Western R. W. Co. ....	14 U. C. R. 102 .....	6
Masuret v. Mitchell .....	26 Gr. 435 .....	726
Matthews v. Baxter .....	L. R. 8 Ex. 132 .....	77, 86
May v. Standard Ins. Co.....	5 A. R. 605.....	369
Mayor of Carlisle v. Blamire .....	8 East 497.....	553
Mayor of Brecon v. Seymour .....	26 Beav. 548 .....	249
Mayor of Rochester v. The Queen .....	E. B. & E. 1024 .....	723
Mayor of Yarmouth v. Simmons.....	47 L. J. N. S. Ch. 792.....	436
Meakin v. Samson .....	28 C. P. 355.....	473, 474, 475, 478
Mellor v. Denham .....	5 Q. B. D. 467 .....	60, 61
Mercantile Trading Co., Re, Stringer's Case .....	L. R. 4 Ch. 475.....	215
Merchants' Bank of Halifax v. Gillespie.	10 S. C. R. 312 .....	618, 619, 620
Merchants' Bank v. Lucas .....	13 O. R. 520....	230, 234, 531, 587, 589, 593, 716
Mersey Steel and Iron Co. v. Naylor....	9 Q. B. D. 648.....	611
Metropolitan Saloon Omnibus Co. v. Hawkins .....	4 H. & N. 87.....	406, 411
Middleton v. New Jersey West Line R. W. Co.....	11 C. E. Green 273 .....	746
Milan Tramways Company, Re, Ex parte Theys .....	22 Ch. D. 122, 25 Ch. D. 587 ..	215, 218
Miles v. New Zealand Alford Estate Co .....	32 Ch. D. 266 .....	12
Mills v. Trumper .....	L. R. 4 Ch. 320 .....	503
Millward v. Midland .....	14 Q. B. D. 68 .....	309, 311
Milroy v. Lord .....	4 D. F. & J. 264.....	624
Minshull v. Oakes .....	2 H. & N. 793 .....	552
Mitchell v. McDuffy .....	31 C. P. 266, 269 .....	283, 286
Moison v. Great Western R. W. Co....	14 U. C. R. 102 .....	6
Molson's Bank v. Corporation of Brockville .....	31 C. P. 174 .....	402
Molson's Bank v. Turley .....	8 O. R. 293 .....	716
Monteith, Re .....	10 O. R. 529, 545 .....	334, 347
Montgomery and Township of Raleigh..	21 C. P. 381 .....	296
Moon v. Towers .....	8 C. B. N. S. 616 .....	524
Morgan v. Malleston .....	L. R. 10 Eq. 475.....	624
Morgan v. Rowlands .....	L. R. 7 Q. B. 493 .....	190
Morphy, Re, Morphy v. Niven .....	11 P. R. 321 .....	256
Morris v. Blair .....	1 Stockton (N. J.) 635 .....	434
Morrison v. Universal Marine Ins. Co..	L. R. 8 Ex. 40, 197 .....	562
Morrow v. Conner .....	22 C. L. J. 348 .....	23
Mors Le Blanche v. Wilson.....	L. R. 8 C. P. 227.....	177, 181
Mortimer v. Slater.....	7 Ch. D. 323 .....	700, 705

NAMES OF CASES CITED.	WHERE REPORTED.	Pages of Vol
Mulholland v. Merriam.....	19 Gr. 288 .....	152
Munday v. Asprey .....	13 Ch. D. 855 .....	202
Munday v. Jolliffe .....	5 My. & Cr. 167 .....	200
Munro v. Smart .....	4 A. R. 449 .....	15
Murphy v. Mason .....	22 Gr. 405 .....	15
Murphy v. Murphy .....	20 Gr. 575 .....	15
Murray v. McCallum.....	8 A. R. 306 .....	473, 474, 479

## Mc.

MacDonald v. McCall .....	12 A. R. 593 .....	227
Macleay, Re.....	L. R. 20 Eq. 189 .....	49, 50
McAndrew v. Bassett .....	4 D. J. & S. 380 .....	735
McArthur v. Corporation of Collingwood	9 O. R. 368 .....	23
McCall v. McDonald .....	13 S. C. R. 247.....	726
McClure v. Kreuteziger.....	6 O. R. 480 .....	453
McCrea v. Waterloo County Mutual Fire Ins. Co .....	26 C. P. 431 .....	617
McCulloch, Re .....	35 U. C. R. 449.....	723
McFadden v. Fortier.....	20 Ill. 109 .....	191
McGarvey v. Corporation of Strathroy..	10 A. R. 631 .....	24, 261, 262, 265
McGuin v. Fretts .....	13 O. R. 699.....	255, 256, 258, 259
McKenzie v. British Linen Co.....	6 App. Cas. 82.....	589
McLaren v. Caldwell.....	5 A. R. 363 .....	435
McLellan v. McKinnon.....	1 O. R. 219 .....	58
McMillan v. Grand Trunk R. W. Co....	12 O. R. 103 .....	636, 637
McMorris, Re .....	8 C. L. J. N. S. 284.....	662, 663
McMullen v. Macdonnell.....	27 U. C. R. 36 .....	240
McNeeley v. McWilliams.....	13 A. R. 324 .....	412, 422, 424
McNish v. Munro .....	25 C. P. 290 .....	109
McQueen v. Phoenix Mutual Fire Ins. Co.	4 S. C. R. 660 .....	323
McSorley v. Mayor of St. John.....	6 S. C. R. 531 .....	402, 404

## N.

Nash v. Hodson .....	1 Jur. N. S. 946 .....	191
Nash v. Hodgson.....	6 DeG. M. & G. 474 .....	193
Neill, Re, Dickey v. Neill .....	9 P. R. 176 .....	256
Nelson v. Bridport.....	8 Beav. 526 .....	538
Newbigging v. Adam.....	55 L. T. N. S. 794, 35 W. R. 597..	568, 582
Newis v. Lark.....	Plowd. 412 .....	350
New York Elevated R. W. Co., Re ....	70 N. Y. 327 .....	434
North v. Champernoon.....	2 Ch. Cas. 79 .....	387
Northwood v. Corporation of Raleigh..	3 O. R. 347 .....	23
Norway, The.....	Moo. P. C. N. S. 245, 11 Jur. N. S. 892, 13 L. T. N. S. 50 ..	174, 178

## O.

Oakland R. W. Co. v. Oakland B. & F. V. R. W. Co .....	45 Cal. 365.....	435
Oddy v. Paulet .....	4 F. & F. 1009.....	276
Ogilve v. Jeafferson .....	2 Giff. 353 .....	717
Oliver v. City of Worcester .....	102 Mass. 489, .....	402
Ollendorf v. Black .....	4 DeG. & S. 209 .....	434
Olmsley v. Young.....	2 My. & K. 780.....	701, 705

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Omnium Securities Co. v. Canada Fire Ins. Co .....	1 O. R. 494 .....	323
Ongley v. Chambers.....	1 Bing. 483 .....	109
Ontario Loan and Savings Co. and Powers	12 O. R. 582 .....	320
O'Reilly v. Thompson .....	2 Cox 271 .....	198
Oriental Bank Corporation, Re, Mac-		
donald's Case.....	32 Ch. D. 366 .....	214
Orme, Re .....	1 Ir. Ch. N. S. 175.....	132
Osborne v. Harvey.....	7 Jur. 229 .....	98, 101
Osborne v. Milman.....	17 Q. B. D. 514, reversed in 18 Q.	
	B. D. 471 .....	61
Osborne v. Rowlett .....	13 Ch. D. 798.....	51

## P.

Page v. Cox.....	10 Hare 163 .....	152
Palmer v. Johnson .....	13 Q. B. D. 351.....	563, 568, 582
Paraguassu Steam Tramway Co., Re,		
Adamson's Case .....	L. R. 18 Eq. 670.....	214
Park v. Phoenix Ins. Co.....	19 U. C. R. 110.....	323
Park Gate Waggon Works Co., Re .....	17 Ch. D. 234.....	214
Parke v. Riley.....	3 E. & A. 237 .....	135
Parkinson v. Higgins .....	37 U. C. R. 308, 40 U. C. R. 274..	273, 274
Parsons v. Queen's Ins. Co.....	2 O. R. 45 .....	353, 363, 365, 516
Partlo v. Todd .....	11 O. R. 171 .....	733
Patent Safety Co. v. Wilson .....	49 L. J. N. S. Ch. 713.....	593
Patten v. Guardians of Edmonton .....	31 W. R. 785 .....	270
Pearman v. Pearman.....	33 Beav. 394 .....	131
Pechel v. Fowler .....	2 Anstr. 549.....	224
Penny v. Turner.....	2 Phillips 493 .....	316
Pennyman v. McGrogan .....	18 C. P. 132 .....	49
Percival v. Frampton.....	2 Cr. M. & R. 180 .....	85
Perdue v. Corporation of Chinguacousy.	25 U. C. R. 61 .....	
Peterborough Real Estate Investment		
Co. v. Patterson .....	13 O. R. 142.....	15, 312, 320
Petrie v. Guelph Lumber Co.....	2 O. R. 218, 11 A. R. 336, 11 S.	
	C. R. 450 .....	562
Philadelphia and Reading R. W. Co. v.		
Anderson .....	39 Amer. R. 781 .....	629
Philadelphia &c. R. W. Co. v. Quigley..	21 Howard 202 .....	402, 406
Phillips v. Eyre .....	L. R. 4 Q. B. 241, .....	534
Phillips v. Grand River Farmers Mutual		
Ins Co .....	46 U. C. R., 335.....	323
Pinkham v. Blair .....	57 New Hamp. 226 .....	701, 704, 705
Pirie v. Wild .....	11 O. R. 422 .....	208
Pitt v. Snowdon .....	3 Atk. 750.....	256
Pitts v. Jameson .....	15 Barb. 310 .....	422
Pittsburg R. W. Co. v. Williams .....	74 Ind. 464.....	629
Poirier v. Morris .....	2 E. & B. 89 .....	85
Pothonier v. Dawson.....	Holt's N. P. C. 385 .....	174
Powell v. Appollo Candle Co.....	10 App. Cas. 282 .....	530, 533
Pratt v. Corporation of Stratford .....	14 O. R. 260 .....	685
Pratt v. Morrison .....	17 Hun, N. Y. S. 475 .....	436
Pratt v. New York Central Ins. Co .....	55 N. Y. 505 .....	324
Preston v. Corporation of Camden and		
Gore .....	Ct. Appeal, February 1, 1887, not	
	yet reported.....	25
Preston v. Luck .....	27 Ch. D. 497 .....	716



NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Proud v. Turner.....	2 P. Wm. 560.....	557
Pulling v. London, &c., R. W. Co.....	3 DeG. J. & S. 661.....	250
Purdy, Ex parte .....	9 C. B. 201 .....	64

## Q.

Quinlan v. Union Fire Ins. Co.....	8 A. R. 376 .....	365
------------------------------------	-------------------	-----

## R.

Radde v. Norman .....	L. R. 14 Eq. 348.....	740
Rae v. McDonald .....	13 O. R. 352, 367 .....	288, 290, 463
Railroad Co. v. Halloren .....	37 Amer. R. 744 .....	629
Ramsay v. Warner .....	97 Mass. 8 .....	191
Randall v. Newson.....	2 Q. B. D. 109 .....	453
Ransome v. Graham .....	51 L. J. N. S. Ch. 897; 47 L. T. N. S. 218, 733	
Rawlins v. Wickham.....	3 D. & G. 304 .....	562
Rayner v. Preston .....	18 Ch. D. 1.....	323
Read v. Perrett ....	1 Ex. D. 349.....	380
Redgrave v. Hurd .....	20 Ch. D. 1 .....	562, 575
Rees v. Fraser.....	25 Gr. 253, .....	701, 703
Reese River Silver Mining Co. v. Smith.	L. R. 4 H. L. 64.....	575
Regina v. Allan .....	L. R. 1 C. C. 367.....	527, 528, 546, 547
Regina v. Allen .....	4 B. & S. 915.....	380, 381
Regina v. Aspinall.....	2 Q. B. D. 61.....	539
Regina v. Bannerman .....	43 U. C. R. 457 .....	348
Regina v. Barrow .....	L. R. 1 C. C. 156 .....	393
Regina v. Barton .....	13 Q. B. 389 .....	64
Regina v. Boyes .....	1 B. & S. 311 .....	348
Regina v. Brawn .....	1 C. & K. 144 .....	546
Regina v. Browne .....	31 C. P. 484, 6 A. R. 386 .....	393
Regina v. Campbell .....	8 P. R. 55.....	647
Regina v. Carden .....	5 Q. B. D. 1, 13 .....	402
Regina v. Chandler .....	14 East 267 .....	647
Regina v. Charleton .....	Jebb's C. C. Ir. 267.....	529
Regina v. Cresswell .....	1 Q. B. D. 446 .....	539
Regina v. Gibson .....	6 Q. B. D. 168.....	380
Regina v. Dent .....	1 C. & K. 97 .....	529
Regina v. Eli .....	13 A. R. 526 .....	659
Regina v. Elliott .....	12 O. R. 524 .....	671
Regina v. Fanning .....	17 Ir. C. L. 289, 10 Cox C. C. 411	528, 546
Regina v. Fee .....	13 O. R. 590 .....	656
Regina v. Fletcher.....	1 C. C. 39 .....	393
Regina v. Gibson .....	18 Q. B. D. 537 .....	529, 550
Regina v. Granger .....	46 U. C. R. 382.....	59
Regina v. Great North of England R. W. Co .....	9 Q. B. 315 .....	407
Regina v. Greenwood .....	7 Cox C. C. 404 .....	393
Regina v. Griffin.....	13 Cox C. C. 178, 14 Cox. C. C. 308.....	525, 528, 540, 548
Regina v. Handsley .....	8 Q. B. D. 383 .....	380, 385, 386
Regina v. Howard .....	45 U. C. R. 346 .....	647
Regina v. Jenkins .....	L. R. 1 C. C. 189 .....	393
Regina v. Johnson .....	13 O. R. 1 .....	675
Regina v. Jones .....	4 F. & F. 25.....	530
Regina v. Justices of Middlesex.....	2 Q. B. D. 516.....	59
Regina v. Justices of Worcestershire....	3 E. & B. 477 .....	59

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Regina v. Keyn.....	2 Ex. D. 94, 160.....	535
Regina v. Klemp.....	10 O. R. 143.....	675
Regina v. Lee.....	9 O. R. 394.....	380
Regina v. Lynch.....	12 O. R. 372.....	671
Regina v. McQuiggan.....	2 L. C. R. 340.....	536, 537, 544
Regina v. Milledge.....	4 Q. B. D. 332.....	380
Regina v. Mills.....	10 Cl. & F. 534.....	529
Regina v. Mount.....	L. R. 6 P. C. 294.....	536
Regina v. Orgill.....	9 C. & P. 80.....	537
Regina v. Pierce.....	13 O. R. 226.....	535
Regina v. Pipe.....	1 O. R. 43.....	26
Regina v. Povey.....	17 Jur. 120, 9 Cox C. C. 83.....	528, 537
Regina v. Ramsay.....	11 O. R. 210.....	378, 380, 388, 672, 675
Regina v. Rand.....	L. R. 1 Q. B. 230.....	380
Regina v. Roddy.....	41 U. C. R. 291.....	60
Regina v. Ryan.....	10 O. R. 254.....	647
Regina v. Savage.....	13 Cox C. C. 178.....	529, 537, 546
Regina v. Smith.....	14 U. C. R. 565.....	529, 538, 546
Regina v. Sproule.....	14 O. R. 375.....	681
Regina v. Tooke.....	32 W. R. 753.....	380
Regina v. Wallace.....	4 O. R. 127.....	647
Regina v. Washington.....	46 U. C. R. 221.....	380
Regina v. Whitchurch.....	7 Q. B. D. 534.....	60, 61
Regina v. Williams.....	42 U. C. R. 462.....	647
Reid v. Corporation of Hamilton.....	5 C. P. 269.....	685
Reid v. Reid.....	31 Ch. D. 402.....	183
Reilly v. Fitzgerald.....	6 Ir. Eq. 335.....	132
Rex v. Bissin.....	Say. 304.....	64
Rex v. Carnarvon.....	4 B. & Al. 86.....	65
Rex v. Catherall.....	2 Str. 900.....	56, 858
Rex v. Hale.....	Cowp. 728.....	56, 57, 58
Rex v. Inhabitants of Brampton.....	10 East 282.....	528
Rex v. Justices of Cambridgeshire.....	1 D. & R. 323.....	59, 65
Rex v. Lloyd.....	2 Str. 996.....	65
Rev v. Lomas.....	Comber. 289.....	65
Rex v. Patchett.....	5 East 344.....	57
Rex v. Robinson.....	17 Q. B. 466.....	58
Rex v. Salomons.....	1 T. R. 249.....	56, 58
Rhodes v. Ibbetson.....	4 DeG. M. & G. 787.....	99
Rice v. Gunn.....	4 O. R. 589.....	537
Richards v. Delbridge.....	L. R. 18 Eq. 11.....	623, 624
Richards v. Ransom.....	10 O. R. 392.....	748
Richards v. Swansea Improvement and Tramways Co.....	9 Ch. D. 425.....	249, 251
Richardson v. Canada West Farmers Ins. Co.....	17 C. P. 341.....	350, 353
Richardson v. Rogers.....	L. R. 3 Eq. 686.....	624
Riel v. Regina.....	10 App. Cas. 675.....	528, 530, 535, 544
River Stave Co v. Sill.....	12 O. R. 557.....	290, 462
Roach v. Trood.....	3 Ch. D. 429.....	202
Roberts v. Hall.....	1 O. R. 388.....	202
Robertson v. French.....	4 East 130.....	692
Robertson v. Robertson.....	24 Gr. 442, 25 Gr. 276.....	660, 662, 663
Robins v. Cubitt.....	46 L. T. N. S. 535.....	319
Roe v. Tramarr.....	2 Sm. L. C., 9th ed., 553.....	692
Rogers v. Rogers.....	For. 268.....	164
Roper v. Roper.....	L. R. 3 C. P. 32.....	310
Rosher v. Rosher.....	26 Ch. D. 801.....	49
Rowell v. Lindsay.....	113 U. S. 97.....	422



NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Rubber Co. v. Gooderham .....	9 Wall. 788 .....	422
Rudge v. Rickens .....	L. R. 8 C. P. 358 .....	273
Russell v. Lewis .....	2 Pick. 507 .....	134
Russell v. The Queen .....	7 App. Cas. 835 .....	747

## S.

Salter v. Brimsden .....	4 Mod. 231 .....	284, 285
Saltmarsh v. Barrett .....	29 Beav. 474, 7 Jur. N. S. 813 .....	167
Samo v. Gore District Mutual Ins. Co. . .	1 A. R. 568 .....	517
Sands v. Standard Ins. Co .....	27 Gr. 167 .....	323, 327
Sauvey v. Isolated Risk Ins. Co. ....	44 U. C. R. 523 .....	517
Scott v. Scholey .....	8 East 497 .....	134
Scott v. Corporation of Peterborough . .	19 U. C. R. 469 .....	744
Scouler v. Scouler .....	8 C. P. 9 .....	49
Sears v. Russell .....	8 Gray (Mass.) 86 .....	701, 705
Seaton v. Mapp .....	2 Coll. 556 .....	99
Sellers v. Dickenson .....	5 Ex. 312 .....	422
Seton, Laing & Co. v. Lafone .....	19 Q. B. D. 68 .....	716
Shaffers v. General Steam Navigation Co.	10 Q. B. D. 356 .....	310
Shaw v. St. Lawrence County Mutual Fire Ins. Co. ....	11 U. C. R. 73 .....	323
Shepherdson v. McCullough .....	46 U. C. R. 573 .....	486
Sheppard v. Keatley .....	1 C. M. & R. 127 .....	100
Sheppard v. Sheppard .....	14 Gr. 174 .....	662, 663
Sherley v. Williams .....	1 Doug. 316 .....	323
Shields v. Peake .....	8 S. C. R. 579 .....	619
Sibley v. Lambert .....	30 Maine 253 .....	191
Sikes v. Wild .....	1 B. & S. 594 .....	524
Simmons and Dalton, Re. ....	12 O. R. 405, 517 .....	723
Simmons v. Simmons .....	5 Notes of Ca. Ec. & Mar. 325, 11 Jur. 830 .....	347
Simpson v. Scottish Union Fire and Life Ins. Co. ....	32 L. J. N. S. 329 .....	498
Simpson v. South Staffordshire Water Works Co. ....	34 L. J. Ch. 380 .....	436
Sinclair v. Canadian Mutual Ins. Co. . .	40 U. C. R. 206 .....	516
Siner v. Great Western R. W. Co. ....	L. R. 4 Ex. 117 .....	77
Singer Manufacturing Co. v. Wilson . . .	2 Ch. D. 434 .....	730
Singleton v. Tomlinson .....	3 App. Cas. 404 .....	134
Sioux City & D. M. R. W. Co. v. Chicago M. & St. P. R. W. Co. ....	27 Fed. Rep. 770 .....	434, 449
Slim v. Croacher .....	1 D. F. J. 518 .....	562
Sly v. Ottawa Agricultural Ins. Co. ....	29 C. P. 557 .....	323
Smart v. Sorenson .....	9 O. R. 640 .....	664
Smith v. Chadwick .....	20 Ch. D. 27, 9 App. Cas. 187 .....	562
Smith v. City of London Ins. Co. ....	11 O. R. 38 .....	716
Smith v. Corporation of Raleigh .....	3 O. R. 405 .....	23
Smith v. Faught .....	45 U. C. R. 484 .....	49, 50
Smith v. Martin .....	2 Wm's Saunders 802 .....	109
Smith v. Norton .....	7 L. J. N. S. 263 .....	662
Smith v. Ridgway .....	L. R. 1 Ex. 46, 331 .....	109
Smith v. Webster .....	3 Ch. D. 49 .....	202
Sneed v. Sneed .....	Ambl. 64 .....	690
Snook v. Town Council of Brantford. . .	14 U. C. R. 255 .....	262
Somerville v. Hawkins .....	10 C. B. 581 .....	276
South Blackpool Hotel Co. re Ex parte James .....	L. R. 8 Eq. 225 .....	215
Southall v. Rigg .....	11 C. B. 488 .....	10

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Southampton Bridge Co. v. Local Board of Southampton .....	8 E. & B. 801 .....	402
Southby v. Hutt .....	2 M. & Cr. 207 .....	99, 100
Sparrow v. Oxford &c., R. W. Co. ....	2 DeG. M. & G. 94 .....	254, 255, 267
Spencer's Case .....	Sm. L. C., 8th ed., p. 68 .....	552
Spill v. Maule .....	L. R. 4 Ex. 232 .....	276, 279
Sperett v. Willows .....	13 D. J. & S. 293 .....	726
Springfield Ins. Co. v. Allen .....	43 N. Y. 389 .....	323
Standing v. Bowring .....	31 Ch. D. 282 .....	166
Stanley v. Stanley .....	7 Ch. D. 589 .....	553
State v. Gumber .....	37 Wis. 303 .....	746
Steamship Co. v. Joliffe .....	2 Wall. 456 .....	746
Steele v. Midland R. W. Co. ....	L. R. 1 Ch. 275 .....	109
Stinson v. Pennock .....	4 Gr. 604 .....	487, 489, 490
Stone v. Hyde .....	9 Q. B. D. 76 .....	300, 309, 310, 311
Stonehouse v. Corporation of Enniskillen	32 U. C. R. 562 .....	262
Stratford and Huron R. W. Co. v. Corpora- tion of Perth .....	38 U. C. R. 112 .....	433, 445
Sussex Peerage Case .....	11 Cl. & F. 85, 528, 520, 530, 549, 550	
Sutherland v. Municipal Council of East Nissouri .....	10 U. C. R. 626 .....	26, 43, 44
Svendsen v. Wallace .....	13 Q. B. D. 69, 10 App. Cas. 404. 175, 178	
Swaby v. Dickon .....	5 Sim. 629 .....	257
Swan v. North British Australian Co. ....	2 H. & C. 175 .....	716
Swain v. Denby .....	14 Ch. D. 326 .....	269
Swan v. Steele .....	7 East 210 .....	77
Swift v. Tyson .....	16 Peters 1 .....	77
Swinbanks, Ex. p. ....	11 Ch. D. 525 .....	718
Symons v. James .....	1 Y. & C. C. C. 487 .....	99
Synnot v. Simpson .....	5 H. L. 121 .....	152

## T.

Tayleur v. Wildin .....	L. R. 3 Ex. 303 .....	90
Taylor v. Grange .....	13 Ch. D. 223 .....	269
Teale v. Younge .....	McL. & Y. 486 .....	291
Tempest v. Lord Camoys .....	21 Ch. D. 571 .....	220, 223
Tench v. Great Western R. W. Co. ....	32 U. C. R. 452 .....	402
Thomas v. Crooks .....	11 U. C. R. 579 .....	563, 568, 582
Thomas v. Quartermaine .....	17 Q. B. D. 414, 18 Q. B. D. 696	
Thomas v. Williams .....	24 Ch. D. 558 .....	220
Thompson v. Hudson .....	L. R. 6 Ch. 320 .....	191
Thompson v. Robertson .....	12 Court of Sessional Cases, 4th Series, 121 .....	309
Thoroughgood's Case .....	2 Co. 90 .....	717
Thorpe v. Richards .....	15 Gr. 403 .....	662, 663
Thurtell v. Beaumont .....	1 Bing. 339 .....	350, 352, 353
Tiffany v. Clarke .....	6 Gr. 474 .....	622, 623
Titusville and Petroleum Centre R. W. Co. v. Warren and Venago R. W. Co. ....	12 Phil. 642 .....	449
Tivnan, Re .....	5 B. & S. 679 .....	527
Tomlinson v. Gill .....	Ambler 330 .....	151
Toomey v. London, &c., R. W. Co. ....	3 C. B. N. S. 146 .....	529
Tower v. Borden .....	1 O. R. 327 .....	132
Towers v. Dominion Iron and Metal Co. ....	11 A. R. 328 .....	453
Trash v. Wood .....	4 My. & Cr. 324 .....	319
Trimble v. Hill .....	5 App. Cas. 342 .....	248, 251
Tulk v. Moxhay .....	2 Phil. 774 .....	555

NAME OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Turnbull v. Forman .....	15 Q. B. D. 234.....	183
Turnbull v. Symmonds.....	6 Gr. 615 .....	273
Tweedie and Miles, Re.....	33 W. R. 133, 27 Ch. D. 315.....	270
Tyrwhitt v. Dawson .....	28 Gr. 112 .....	312

## U.

Ulster Saving Institution v. Leake.....	73 N. Y. 161.....	529, 323, 550
---	-------------------	---------------

## V.

Vander Douckt v. Thelluson .....	8 C. B. 812 .....	529, 538
Vandecar v. Corporation of East Oxford.	3 A. R. 146 .....	266
Van Egmond v. Corporation of Seaforth.	6 O. R. 610 .....	261, 264
Van Wyck v. Knevals.....	106 U. S. 360 .....	436
Varden v. Varden .....	6 O. R. 719.....	202
Vaughton v. London and North Western R. W. Co.....	L. R. 9 Ex. 93, .....	334
Vertue v. Beasley.....	1 M. & Rob. 21.....	90
Vicar and Churchwardens of St. Sepulchres Ex. p., In re Westminster Bridge Act, 1859 .....	36 L. J. Ch. 376.....	445
Vincent v. Godson .....	24 L. J. Ch. 121.....	90
Vogel v. Grand Trunk R. W. Co.....	2 O. R. 197, 10 A. R. 162, 11 S. C. R. 612 .....	626, 629, 635, 637, 640, 642
Vorley v. Cooke .....	1 Cliff. 130 .....	717
Voss v. Fisher.....	113 U. S. 213 .....	422

## W.

Waddell v. Wolfe .....	L. R. 9 Q. B. 515 .....	100
Wadley v. North.....	3 Ves. 364 .....	131, 132
Wainford v. Heyl .....	L. R. 20 Eq. 324.....	555
Wakefield v. Brown.....	9 Q. B. 209 .....	552
Wakefield v. Maffet .....	10 App. Cas. 422 .....	132
Walker v. Butler .....	6 E. & B. 506 .....	191
Walker v. Hyman .....	1 A. R. 353 .....	589
Walsh v. Trevanion .....	15 Q. B. 733 .....	692
Walton v. Walton .....	14 Ves. 322.....	163
Warman v. Kyman.....	1 Ex. 118 .....	191
Warnier v. Rogers .....	L. R. 16 Eq. 340.....	624
Warwick v. Harvie.....	10 Ex. 762 .....	10
Watkins v. Rymill .....	10 Q. B. D. 178 .....	636
Watson v. Duguid .....	24 Ch. D. 244.....	321
Watt v. District Mutual Ins. Co.....	8 Gr. 523 .....	491
Watts v. Kelson.....	L. R. 6 Ch. 166 .....	117
Webb v. Hewitt .....	3 K. & J. 438 .....	209
Weblin v. Ballard .....	17 Q. B. D. 122 .....	310
Webster v. Leys .....	28 Gr. 475 .....	132
Weld v. South Western R. W. Co.....	1 E. & B. 253 .....	436
West v. Corporation of Parkdale.....	7 O. R. 270, 8 O. R. 59, 12 A. R. 393, 11 S. C. R. 250, 12 App. Cas. 602.....	682, 684
West v. Lassels .....	Cro. Eliz. 851 .....	503
Westacott v. Fargo .....	61 N. Y. 542 .....	629
Westloh v. Brown .....	43 U. C. R. 402.....	589
Westminster Estate of the Parish of St. Sepulchre, Re .....	4 D. J. & S. 232 .....	435

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Wharton v. Baker .....	4 K. & J. 483 .....	701
Whimsell v. Giffard .....	3 O. R. 1 .....	90
Whitby v. Mangles .....	10 C. & F. 215 .....	703
Whitecomb v. Whitney .....	1 Sm. L. C., 7th ed., 648 .....	191
White v. Baker .....	2 D. F. & J. 55 .....	708
White v. Bastedo .....	15 Gr. 546 .....	662, 663
White and Corporation of Sandwich East	1 O. R. 530 .....	297
White v. Hunt .....	L. R. 6 Ex. 32 .....	552
Whitfield v. South Eastern R. W. Co..	E. B. & E. 115 .....	401, 407
Whitney v. Toby .....	6 O. R. 54 .....	292
Wilby v. Standard Ins Co. ....	3 O. R. 115 .....	517
Wilcocks v. Howell .....	5 O. R. 360 .....	276, 402
Wilde v. Gibson .....	1 H. L. C. 605 .563, 580, 581, 582, 583, 584 .....	
Wilder v. Walford .....	53 L. J. Ch. 505 .....	217
Williams v. Arkle .....	L. R. 7 H. L. 606 .....	155, 168, 169
Williams v. Beaumont .....	10 Bing. 260 .....	405, 411
Williams v. Burgess .....	12 A. & E. 635 .....	617
Williams v. Clough .....	3 H. & N. 258 .....	126
Williams v. Stiven .....	9 Q. B. 14 .....	90
Williamson v. Commercial Union Assur- ance Co .....	25 C. P. 453 .....	517
Wilson v. Black .....	6 P. R. 130 .....	617
Wilson v. Collins .....	5 C. & P. 373 .....	276
Wilson v. Corporation of Middlesex ....	18 U. C. R. 352 .....	43
Wilson v. Gabriel .....	4 B. & S. 243 .....	218
Wilson v. Wilson .....	24 Gr. 394 .....	723, 725
Withers v. North Kent R. W. Co. ....	27 L. J. N. S. Ex. 417 .....	629
Wood v. Beard .....	2 Ex. D. 30 .....	501
Wood v. Hamilton and North Western R. W. Co. ....	25 Gr. 135 .....	202
Woodhouse v. Anglo-Australian Ass. Co	3 Giff. 238 .....	592
Woods Trade Mark .....	32 Ch. D. 247 .....	730
Woodward v. Lander .....	6 C. & P. 548 .....	276
Workman v. Robb .....	28 Gr. 243, 7 A. R. 389 .....	726
Worthington v. Bearse .....	12 Allen Mass. 382 .....	323
Worthington v. Grimsditch .....	7 Q. B. 479 .....	191
Worthington & Co's Trade Mark .....	14 Ch. D. 8 .....	730
Wotherspoon v. Currie .....	L. R. 5 H. L. 508 .....	730
Wragg's Trade Mark .....	29 Ch. D. 551 .....	730
Wright v. Card .....	4 Drew. 673 .....	552, 554
Wright v. Leys .....	8 O. R. 88 .....	486
Wright v. Oakley .....	5 Met. (Mass.) 406 .....	745

## X.

Xantho, The ..	11 P. D. 170 .....	177
----------------	--------------------	-----

## Y.

Yates v. Tearle .....	13 L. J. N. S. 289 .....	285
Yeagar v. Wallace .....	44 Penn. 294 .....	256
Yeomans v. Corporation of Wellington..	4 A. R. 301....261, 262, 264, 265, 522	
Yielding v. Westbrook .....	31 Ch. D. 344 .....	99
Yorkshire Banking Co. v. Beatson .....	5 C. P. D. 109 .....	77, 82
Young, Ex. p., In re Day .....	27 W. R. 942 .....	218

## MEMORANDA.

On the 3rd November, 1887, the Honourable JOHN O'CONNOR, one of the Justices of the High Court of Justice for Ontario, died at the Town of Cobourg.

On the 7th of November, 1887, the Honourable THOMAS GALT, one of the Justices of the High Court of Justice for Ontario, was appointed President of the Common Pleas Division of the High Court of Justice for Ontario, with the title of Chief Justice of the Common Pleas, *vice* the Honourable Sir MATTHEW CROOKS CAMERON, Knight, deceased.

On the 14th of November, 1887, the Honourable ADAM WILSON, President of the High Court of Justice for Ontario, Chief Justice of the Queen's Bench, resigned his office.

On the 15th of November, 1887, the Honourable JOHN DOUGLAS ARMOUR, one of the Justices of the High Court of Justice for Ontario, was appointed President of the Queen's Bench Division of the High Court of Justice for Ontario, with the title of Chief Justice of the Queen's Bench, *vice* the Honourable Sir ADAM WILSON, resigned.

On the 21st of November, 1887, WILLIAM GLENHOLME FALCONBRIDGE, one of Her Majesty's Counsel, was appointed a Judge of the Supreme Court of Judicature for Ontario.

On the same day the Honourable WILLIAM GLENHOLME FALCONBRIDGE, a Judge of the Supreme Court of Judicature, for Ontario, was appointed a Justice of the High Court of Justice for Ontario.

On the same day the Honourable WILLIAM GLENHOLME FALCONBRIDGE, a Justice of the High Court of Justice for Ontario, was appointed a member of the Queen's Bench Division of the High Court of Justice for Ontario.



On the 30th of November, A.D. 1887, WILLIAM PURVIS ROCHFORD STREET, one of Her Majesty's Counsel, was appointed a Judge of the Supreme Court of Judicature for Ontario.

On the same day the Honourable WILLIAM PURVIS ROCHFORD STREET, a Judge of the Supreme Court of Judicature for Ontario, was appointed a Justice of the High Court of Justice for Ontario.

On the same day the Honourable WILLIAM PURVIS ROCHFORD STREET, a Justice of the High Court of Justice for Ontario, was appointed a member of the Queen's Bench Division of the High Court of Justice for Ontario.

On the same day HUGH MACMAHON, one of Her Majesty's Counsel was appointed a Judge of the Supreme Court of Judicature for Ontario.

On the same day the Honourable HUGH MACMAHON, a Judge of the Supreme Court of Judicature for Ontario was appointed a Justice of the High Court of Justice for Ontario.

On the same day the Honourable HUGH MACMAHON, a Justice of the High Court of Justice for Ontario, was appointed a member of the Common Pleas Division of the High Court of Justice for Ontario.

On the 20th of December, A. D. 1887, the Queen was pleased to confer the honour of Knighthood on the Honourable ADAM WILSON, late President of the High Court of Justice for Ontario, and Chief Justice of the Queen's Bench.

---

#### ERRATA.

P. 432, line 7 from bottom of headnote, for "special" read "general."

P. 462, line 6 from bottom, for "defendant" read "plaintiff."

P. 462, line 7 from bottom, for "plaintiff" read "defendant."

P. 499, second line of headnote, after the word "year" add "to year."

# REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON  
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

---

[QUEEN'S BENCH DIVISION.]

O'DONNELL V. DUCHENAULT ET AL.

*Replevin bond—Delay of plaintiff in replevin action—Postponement of trial  
—Change of venue in replevin in County Court—R. S. O. ch. 53 sec.  
23—R. S. O., ch. 50 sec. 155—Notice of exception to pleading.*

The trial of an action of replevin in a County Court was, by a Judge's order, on the application of the plaintiff therein postponed to the next sittings thereof, and subsequently the action was by Judge's order transferred to another County Court.

In an action on the replevin bond it was *Held*, on demurrer, that the delay being that of the plaintiff in replevin without the consent or connivance and against the opposition of the defendant therein, the sureties to the bond were not discharged.

*Held*, also, that the venue in any action of replevin in a County Court, except for goods distrained, may be changed to any other county under sec. 155 of R. S. O. ch. 50.

A party whose pleading is demurred to may still serve a notice of exception to the pleading of the opposite party.

## STATEMENT OF CLAIM :

1. The defendant Duchenaault commenced an action of replevin against the plaintiff on 2nd October, 1885, in the County Court of the county of Simcoe, to recover possession of the chattel property in the second paragraph here set out.

2. The defendants by their bond, dated 5th October, 1885, became jointly and severally bound to Thomas David McConkey, sheriff of the county of Simcoe, or his assignee, in the sum of \$400, subject to certain conditions, that if Duchenault prosecuted his said suit with effect and without delay for taking and unjustly detaining his goods, chattels and personal property, and made a return thereof, if a return should be adjudged, and also paid such damages as the plaintiff should sustain by the issuing of said writ of replevin, if said Duchenault failed to recover judgment in said suit; and further, if said Duchenault did observe, keep, and perform all rules and orders made by the Court in said suit, said bond should be void, otherwise should be in full force.

3. Said action was afterwards, by Judge's order, transferred to and became an action in the County Court of the county of Dufferin.

4. Said action was afterwards brought on for trial at the County Court of the county of Dufferin, where judgment was given for plaintiff, and a return of said goods ordered to be made by Duchenault to plaintiff, and said Duchenault was also ordered to pay plaintiff's costs of defence, and final judgment was entered accordingly.

STATEMENT OF DEFENCE of defendants McDougall and Langley, the sureties to the replevin bond. \* \*

3. That said County Court action was first brought on for trial at the County Court of the county of Simcoe, where without any reference to or consent of these defendants said trial was postponed to a subsequent Court, when said cause was tried and verdict rendered for said Duchenault: that subsequently a new trial was granted on the application of the defendant in that cause (the plaintiff herein), after which the order transferring said cause to the county of Dufferin was made as mentioned in the 3rd paragraph of said statement, of which several orders above mentioned these defendants received no notice, and were not consenting parties thereto,



whereby these defendants became released from the penalty of said bond.

#### REPLY.

2. That when said County Court action came on for trial at the sittings of the County Court of the county of Simcoe, holden in December, 1885, application was made on behalf of plaintiff therein, the above-named defendant Duchenaault, to the Judge for a postponement of said trial until the next June sittings of said Court, which application was opposed by the plaintiff herein, and said Judge thereupon without the consent of plaintiff herein ordered that said trial should be postponed, being the postponement referred to in the 3rd paragraph of the statement of defence.

Demurrer by defendants McDougall and Langley :

That said paragraph contained nothing in answer to the paragraph of the defence which it purported to answer.

The plaintiff then served a notice of exception to the third paragraph of the statement of defence of the defendants McDougall and Langley, upon the ground that it did not appear therefrom but that the postponement of such trial was made under an order of the Judge of said County Court, and not with the consent or on the application of the plaintiff herein ; and that it did appear that the granting of the new trial, and transfer of the action to the county of Dufferin, were accompanied by orders to that effect made by the Judge of the County Court of Simcoe, and that the various proceedings were taken agreeably to orders therefor made by the said Judge, and did not release the said defendant.

June 10, 1887. *T. W. Howard*, for the demurrer.

*Osler*, Q.C., contra.

June 16, 1887. O'CONNOR, J.—Section 23 of the Replevin Act R. S. O. ch. 53, says : " Where the replevin

is brought for goods, chattels, or other personal property distrained for any cause, the venue shall be laid in the county in which the distress has been made, but in other cases it may be laid in any county."

Section 155 of the Common Law Procedure Act, R. S. O. ch. 50, provides that "in all actions brought in a County Court the Judge of the County Court where the proceedings are commenced, or one of the Judges of the Superior Courts sitting at chambers, may change the venue according to the practice now in the Superior Courts; and in the event of an order being obtained for that, the clerk of the County Court where the action was commenced shall forthwith transmit all papers in the cause to the clerk of the County Court to which the venue is changed; and all subsequent proceedings shall be entitled in such last mentioned Court and carried on in such last mentioned Court, and carried on there as if the proceedings had originally been commenced in such last mentioned Court."

I am by no means prepared to say that under the last cited section the venue may not be changed as well in any action of replevin as in any other action, but I have no hesitation in expressing a decided opinion that it may be changed in any action of replevin brought for any other cause other than for distress. Counsel for the demurrer argued strenuously, and not without plausibility, that the Replevin Act being a special one, the practice indicated by it should be followed and could not be controlled by the provisions of a general Act such as the Common Law Procedure Act; but the Replevin Act is not imperative as to the venue in any action brought thereunder except in respect to distress.

There is, then, no inconsistency between the two clauses, and they may stand together: besides, they do not, in my opinion, fall within the rule invoked.

The action of replevin mentioned in the statement of claim in this action was not for goods taken for a distress, but for the taking and unjustly detaining "his" (the plaintiff's) "goods, chattels and personal property," which were

the subject of that action. It belonged, therefore, to the class of actions in replevin referred to in the latter part of sec. 25, before cited, and the venue may be laid in any county. If it may be laid in any county it may surely be changed to any county, under sec. 155 of the Common Law Procedure Act. It was also urged that the defendants, the sureties, who demurred to the plaintiff's replication, were discharged from liability on the replevin bond, because there was delay and the suit had not been prosecuted without delay as required by the condition of the bond. That would be a ground upon which the plaintiff (the defendant in the action of replevin (*Gent v. Cutts*, 11 Q. B. 288; *Canniff v. Bogert*, 6 C. P. 477,) might claim a forfeiture of the bond, and if unnecessary delay had been caused by the plaintiff, or if it had taken place by the assent or consent of the plaintiff, and without the assent or consent of the sureties, the cases shew that the sureties would be discharged. But it is otherwise where the plaintiff in the replevin action has delayed or procured delay without the assent, consent or connivance of the defendant therein.

If the reverse of this were the rule the replevin bond would be a useless thing, a deception; for in order to free his sureties the plaintiff in replevin would merely have to delay, which he could do at will. This seems absurd, and a contradiction in terms of the rule founded on the condition of the bond, that the delay of the plaintiff shall effect a forfeiture of the bond for the benefit of the defendant.

In this case the plaintiff's replication, which is demurred to, alleges that the order for a postponement of the trial was made on the application of the plaintiff in replevin and granted by the Judge against the opposition and without the consent of the defendant, the plaintiff herein.

The defendants herein, McDougall and Langley, in the 3rd paragraph of their statement of defence do not allege that the delay or the proceedings which they allege caused the delay of which they complain was or were caused by the defendant or with her consent, and that

paragraph was in that respect, I think, demurrable ; but, as the plaintiff did not demur, it was probably necessary, or at least advisable, to negative those facts in replication to prevent an immaterial or doubtful issue.

When the replication was demurred to the plaintiff had a right to go back and take exception to the defective—the 3rd—paragraph of the statement of defence ; and that is what was done, as in *Moison v. The Great Western R. W. Co.*, 14 U. C. R. 102, and in five other cases there mentioned.

I overrule the demurrer to the replication, and allow the plaintiff's exceptions to the 3rd paragraph of the statement of defence, with costs.

*Judgment for plaintiff on demurrer.*

---

## [QUEEN'S BENCH DIVISION.]

## MCGREGOR V. BISHOP ET AL.

*Promissory note—Partial failure of consideration—Parol agreement to reduce face value of note by liquidated amount—Endorsement after maturity.*

The defendants purchased the stock in trade of one C. for \$5,500, and an agreement under seal was executed by the parties whereby defendants covenanted to pay the said sum. The agreement also provided that a portion of the consideration should be secured by four promissory notes of \$1100 each. After the last note became due C. endorsed it "without recourse" to the plaintiff. To an action on the note the defendants pleaded that the value of the goods had been misrepresented to them by C. and that before said note became due C. agreed to allow a reduction of \$500 from its face value, and that plaintiff took the note after it had become due. They paid \$626.50 into Court, being the balance due on the note with interest.

At the trial the plaintiff, in his evidence, admitted that he did not claim to occupy any different position from C. The defendants' evidence shewed a verbal agreement to make the reduction of \$500, but C. swore he had never made the agreement. The Judge at the trial found that C. had promised to make the reduction, and that the plaintiff stood in the same position as C. and he dismissed the action, with costs.

*Held*, that defendants had a right to enforce the agreement for the allowance of \$500, there being a partial failure of consideration for an ascertained and liquidated amount.

**ACTION** to recover from defendants the amount alleged to be due on a promissory note for \$1,100, made by the defendants, payable to one John B. Carter, and endorsed by Carter to plaintiff.

The case was tried by Galt, J., without a jury, at Toronto, on January 6, 1885.

The note was dated on the 18th day of September, 1882, and it appeared that on that day defendants purchased from Carter the goodwill of a business theretofore carried on by him at Toronto as manufacturer of and dealer in maps, globes, rollers, and other school supplies, and of a large portion of stock which Carter had on hand, for \$5,500.

An agreement under seal was executed, whereby the defendants covenanted to pay the said amount.

Defendants paid \$250 in cash, and defendant Bishop assigned to Carter his equity of redemption in certain real estate valued at \$850; and both defendants made and



delivered to him their four promissory notes for \$1,100 each, payable respectively on 1st December, March, June and September following.

Defendants said that they had had no experience in the kind of business sold to them by Carter, and were not able to judge of the value of the stock which they purchased, and that they took the stock at the valuation placed on it by Carter, which he represented as below the cost value thereof; but shortly after the transaction closed they discovered that Carter had falsely represented the value: that he had in fact set a value on the stock to \$2000 more than the cost value at which he had pretended to have put it down: that they informed Carter of this and demanded a re-adjustment of the transaction; and they said that Carter admitted their claim in part, and after some discussion and negotiation he agreed to allow them a reduction of \$500, adding, however that he could not allow it on the first note, but would allow it on and in reduction and as payment *pro tanto* of the last note to fall due. The defendants with hesitation agreed to this as a compromise. This was shortly after the transfer of the business and stock had taken place and before the first note had fallen due.

The defendants paid the first three notes, and after the fourth, the note now in suit, fell due, Carter, without saying anything about it to the defendants, endorsed the note over to the plaintiff for the purpose of collection only.

The other facts appear in the judgment.

The learned Judge reserved the case and afterwards gave judgment for the defendants, dismissing the action, with costs.

June 2, 1887, *A. C. Galt*, moved to set aside the judgment.

*W. Nesbitt*, shewed cause.

June 28, 1887. O'CONNOR, J.—The plaintiff is a practising solicitor. Carter endorsed the note “without

recourse," and in consideration thereof took the plaintiff's note payable to himself at six months. Then suit was brought on this note in the name of one Pritchard, a person who had a desk in the plaintiff's office, at which he performed some business of his own, and attended occasionally to business of the plaintiff. Pritchard, however, was examined, and thereupon admitted his real position in the case; and thereupon it was ordered that the name of the present plaintiff should be substituted for that of Pritchard, which was done.

The defendants paid into Court, with their statement of defence, the sum \$626,50, which with the \$500 reduction claimed by them, is the amount of the note and interest. And in regard to this money paid into Court, another noticeable fact seems to have occurred. Carter was a witness for the plaintiff at the trial, and on cross-examination he admitted that he had got part of the money, and the cross-examining counsel said: "Got the money out of Court I suppose?" To this the reporter notes, "No answer." The inference from this is palpable enough, especially as the plaintiff in his examination admitted candidly that he was precisely in the same position in the case as Mr. Carter, and that he did not claim to be in any other position.

In the further consideration of the case I shall therefore consider it as if Mr. Carter were the actual, as well as the virtual plaintiff in this action.

The question now is, have the defendants a right at law or in equity in this action to enforce the plaintiff's agreement, assuming that such an agreement was made, for the allowance by way of reduction on this note of \$500, pursuant to the agreement set up by the defendants in their statement of defence?

In *Chalmers on Bills*, 1st ed., p. 78, Art. 93, it is said: "Partial failure of consideration is a defence *pro tanto* against the immediate party when the failure is an ascertained and liquidated amount, but not otherwise";



and the cases *Day v. Nix*, 9 Moore 159, and *Warwick v. Nairn*, 10 Exch. 762 are cited.

In the case in 10 Exch. the Court held the plea of partial failure of consideration bad on demurrer, on the ground that the amount was indivisible and unascertained. But that doctrine does not apply here where the amount was ascertained by the agreement of the parties. This case is, then, the contradictory of that, and therefore the plea is good. The principle of *Forman v. Wright*, 11 C. B. 481, is distinctly in point here, and supports the contention of the defendants. In that case, to a count on a promissory note for £32,6.10, the defendant pleaded as to £21,11.11, parcel, that before the making of the note, he was indebted to one F., in the sum of £10,4.11, and no more: that the plaintiff fraudulently, deceitfully and falsely represented to the defendant that there was due from the defendant to F the sum of £32,6.10; and then demanded of, and by means of such representation, induced the defendant to deliver to him the note in the count mentioned. At the trial it was found by the jury that the note was obtained by false representation by the plaintiff, but that such representation had been made without fraud. It was held that the plea was proved, for that the words "fraudulently and deceitfully" might be rejected, and that the plea was, in substance, a plea of partial failure of consideration. This case was decided and reported with the case, *Southall v. Rigg*, 488, of the same volume of the C. B. reports.

Again *Chalmers*, 1st ed. p. 76, art. 91: "Mere absence of consideration, total or partial, is matter of defence against the immediate party, or a remote party, who is not a holder for value;" for which he cites *Forman v. Wright*.

To the same effect as *Forman v. Wright* are *Darnell v. Williams*, 2 Stark. 166; *Clarke v. Lazarus*, 2 M. & G. 167; and see *Daniel* on Negotiable Instruments, sec. 201; *Byles* on Bills (Sharswood's ed.) 239 or 98. *Burrough v. Moss*, 10 B. & C., and the cases following it, do not apply to this case: the distinction is too clear to need specification.

The next matter for consideration is, did the real plaintiff John B. Carter agree to allow the \$500, as the defendants allege he did? Carter denies it. The learned Judge finds on the evidence that he "promised the defendants he would make a deduction of five hundred dollars from the note in question as a settlement of the dispute that had arisen between them as to the valuation of the stock of goods in consideration of which the notes were given." And he proceeds: "I find that the present plaintiff took the note long after it was due, and under such circumstances as satisfy me the transfer of the note was made for the purpose of defeating the said settlement." This is the finding of facts on conflicting evidence; and I think it is well established that such findings should not be disturbed unless they are clearly erroneous—are contrary to a manifest preponderance of the evidence.

In comparing the evidence of each side, one against the other, with reference to the first fact found by the learned Judge, it is necessary, I think, to consider the commencement of the action.

Why did Carter transfer the note to his solicitor, instead of following the direct and usual course of suing it in his own name? Was that done, as the Judge finds it was, to avoid the agreement which he had made, and thereby to defraud the defendants? If it was not done for this purpose, what was it for? No other even plausible purpose is put forth or alleged by either the real or nominal plaintiff.

Carter admits that he may have said that he did it so that he might be a witness for the plaintiff—a disinterested witness, of course; but the evidence of a man who resorts to petty, but deceitful, trickery of that kind to avoid his contract, should, in my opinion, be received with suspicious caution and considerable reservation in the trial of the same transaction. He appears before the Court tainted with deceit, with an attempted fraud, and he is not unlikely to endeavour "to swear himself through," even at some risk; at all events, nothing can be presumed in favour of

his morality, nor therefore in favour of his veracity. The defendants on the other hand appear before the Court without any such taint, and with the ordinary presumption of honesty and veracity in their favor, and they concur in stating in their evidence the agreement and facts substantially as alleged in their statement of defence.

It was urged on behalf of the plaintiff that there was no consideration for the promise to allow the \$500 on the note in question ; but the defendants, in accepting the offer in settlement of their claim, agreed to give up that claim, and that was a good consideration : *Miles v. The New Zealand Alford Estate Co.*, 32 Chy. D. 266 ; *Cook v. Wright*, 1 B. & S. 559 ; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449.

I do not see that the Statute of Frauds, which was also invoked, has any application to the case.

In my opinion the motion to set the judgment aside should be dismissed, with costs.

WILSON, C.J., and ARMOUR. J., concurred.

*Motion dismissed, with costs.*

---

## [CHANCERY DIVISION.]

## RYAN V. COOLEY ET AL.

*Will—Construction—Period of distribution—Survivor of class attaining majority—Gift of maintenance—Duration of—Vesting.*

C. devised the residue of his real estate to his executors in trust for his four children (naming them) "until they or the survivor or survivors of them shall have attained the age of 21 years, said real estate to be divided amongst the said four children share and share alike, and in case any of them shall have died leaving issue, the said issue shall take the share which otherwise would have gone to his, her, or their parent." He also directed that his executors should provide for the maintenance, support, and education of the said four children during their minority out of the income of his residuary property. He also directed his executors to invest all surplus moneys in their hands from time to time "during the infancy of my said last mentioned four children, and upon the youngest of them, or the survivor or survivors of them, attaining the full age of twenty-one years to divide the said personal estate share and share alike between them or the survivor or survivors of them," and that they should upon any of his said children attaining twenty-one advance such sum out of the share of such child as might be desirable for establishing him in some business or professional pursuit. He further directed that any posthumous child should take an equal share of his real and personal estate with his said four children, and be treated in every respect as the others. He further willed all the residue of his personal estate to his executors in trust for his said four children, share and share alike to be divided at the same time the division of the real estate should take place.

*Held*, that the words "until they or the survivor or survivors of them attain twenty-one" meant until the youngest survivor of the children attained that age, and that the lands were to be held in trust till that period and then divided, that being the period of distribution when the members of the class entitled to share were to be ascertained, and that the gifts of both real and personal estate were contingent upon the beneficiaries reaching that period, whether children or issue of deceased children, and the provision as to maintenance did not import immediate vesting.

*Held*, also, that P. J. C., one of the four children who had attained twenty-one was not entitled to maintenance after that age.

THIS action was brought on behalf of Johanna Ryan, a lunatic, by the Toronto General Trusts Company, her committee, for the construction of the will of Samuel Cooley, and a determination of the rights of all parties, and further relief.

The plaintiff was the widow of the said Samuel Cooley, and the defendants were the executors of the will and four children of Samuel Cooley, of whom three were, at the

time of this action, under age, and who were beneficiaries under the will.

The facts of the case appear in the judgment sufficiently for the present report.

The action came on for trial on November 19th, 1886, at Toronto, before Ferguson, J., when a compromise with regard to certain claims of the plaintiff was consented to between the parties and approved of by the Court ; and as to the questions arising upon the said will with respect to the rights of the children, defendants to this action, the Court ordered the argument to stand adjourned, and that some one should be appointed to represent the possible issue of the said defendants.

On January 22nd, 1887, John Hoskin, Q.C., official guardian, was duly appointed such representative, and these questions came on for argument on January 31st, 1887.

*Moss*, Q.C., for the executors and trustees under the will. The clause for advancement to anyone who attains twenty-one is inconsistent with any view but that the period of distribution is at the time the youngest attains twenty-one.

*J. Hoskin*, Q.C., for the possible issue of Peter James Cooley. The interests are vested liable to be divested on the happening of a contingency. I refer to *Simpson* on Infants, p. 243 ; *Hawkins* on Wills p. 240, 241.

*Clute*, for Peter James Cooley. There was a vesting at the time of the testator's death ; the period of distribution makes no difference as to this. In any view, the interest of Peter James Cooley became vested at twenty-one. The division is to be amongst the four children, and not the survivor of them. There is no period of distribution as to the realty at all ; but there may be as to the personalty. The partition means that as each attains twenty-one he is to be given his share. The maintenance clause does not combat this idea, because the share given out to the one who attained twenty-one would be "otherwise devised." If Peter James had died before twenty-one his share would have gone to his children ; but as he has attained twenty-



one the contingency has ceased. On this part of the case I cite *Farrell v. Farrell*, 26 U. C. R. 652; *Chitty's Eq. Dig.* 3577; *Dobbie v. McPherson*, 19 Gr. 262; *Murphy v. Murphy*, 20 Gr. 575; *Murphy v. Mason*, 22 Gr. 405; *Munro v. Smart*, 4 A. R. 449; *Griffith v. Griffith*, 29 Gr. 145; *Keefer v. McKay*, 29 Gr. 162. As to whether Peter James is entitled to maintenance after attaining twenty-one: *Theobald on Wills*, 2nd ed., pp. 333, 403, 417, 418; *Watson's Comp. of Equity Jurisp.*, 2nd ed., pp. 1214, 1215; *Lane v. Goudge*, 9 Ves. 225; *The Peterborough Real Estate Investment Co. v. Patterson*, 13 O. R. 142; *Clifford v. Koe*, 5 App. Cas. 447.

*Kerr*, Q.C., for the infants now living, cited *In re Hunter's Trusts*, L. R., 1 Eq. 295; *Theobald on Wills*, 3rd ed., pp. 378, 384, 388; *Re Charles, Fulton v. Whatmough*, 10 A. R. 281.

February 2nd, 1887. FERGUSON, J.—In the month of November last this case was before me. Counsel had before then certainly been at much trouble in effecting an arrangement of many important matters of the action, which arrangement was, after consideration, approved of by me on behalf of the infants. There were, however, the further questions, (1) as to the interests that the infants and Peter James Cooley respectively take under the will, whether vested or contingent; and, if contingent, what is the contingency on which the interests depend: and (2) whether or not Peter James Cooley is entitled to maintenance out of the estate after his having attained his majority. These questions have been this day argued by counsel, the argument taking a somewhat wider range, and involving the consideration of several parts of the will of the late Mr. Cooley.

The clauses or paragraphs of the will are not numbered; but for convenience I will place numbers opposite the various clauses referred to in the argument, and which I set out below. They are as follow:

1. "I further will and devise all the rest and residue of my said real estate unto my executors and executrix hereinafter named, or to such of them as shall prove my will to hold the same upon the trusts, and to the uses and purposes herein mentioned; that is to say, in trust for my children Peter Cooley, John Cooley, Samuel Cooley, and Mary Agnes Cooley until *they* or the survivor or survivors of them shall have attained the age of twenty-one years; said real estate to be divided amongst said last mentioned four children, share and share alike, and in case any of them shall have died leaving issue the said issue shall take the share which otherwise would have gone to his, her, or their parent."

2. "And as regards my real estate so to be divided, I will and direct that my executrix and executors, or the survivors of them, shall make the partition thereof and shall allot to each the portion to which each shall be entitled, and the division of the said real estate made by them, or the survivor or survivors of them, shall be final on all."

3. "I further will and direct that my said executrix and executors shall provide for the maintenance, support, and education of my said four children last above named during their minority, out of the income to be derived from time to time out of my real and personal property not otherwise devised and bequeathed by this my will."

4. "I also will and direct my said executrix and executors to invest at interest on mortgages or other good security all surplus moneys in their hands from time to time during the infancy of my said last mentioned four children, and upon the youngest of them, or the survivor or survivors of them, attaining the full age of twenty-one years to divide the said personal estate, share and share alike, between them, or the survivor or survivors of them. And I further will and direct my said executrix and executors, if it shall seem prudent for them so to do, upon any of my said four last mentioned children attaining the full age of twenty-one years, shall advance such sum or sums of money out of the share or shares of such child as may

be desirable for establishing such child in some business or professional pursuit."

5. "And I further will to my said beloved wife, Johannah Cooley the sum of one thousand dollars per annum, to be paid to her quarterly during her lifetime, which annuity I hereby charge upon my said personal estate."

6. "I hereby further will and direct that in the event of a child or children being born, issue of my body, by my present wife, Johannah Cooley, after my death, such child or children shall take an equal share of my real and personal estate with my said last mentioned four children, and be treated in every respect by my said executrix and executors as the other said four last mentioned children \* \*."

7. "I do hereby further will and devise all my personal estate of every kind whatsoever not hereinbefore devised by this my will to my said executrix and executors, or such of them as may prove this my will, in trust for my said last mentioned four children, share and share alike, to be divided at the same time the division of said real estate takes place as hereinbefore mentioned."

The other provisions of the will do not seem to be important to the determination of the questions now raised, excepting that it is shewn by them or some of them that the testator had other children for whom he provided by the earlier parts of the will.

By the clause of the will which I have numbered four, above, the testator directed the investment and accumulation of moneys from time to time in the hands of the executors during the infancy of the four children, and a distribution of the same personal estate upon the youngest or the survivors or survivor of them attaining the full age of twenty-one years, such distribution to be amongst them or the survivors or survivor of them.

By the clause number seven, above, the personal estate mentioned in the clause is to be distributed at the same time as the division of the real estate.

By the clause numbered one, above, the real estate mentioned in it is to be held in trust until the four children, or

the survivors or survivor of them, attain the full age of twenty one years, and it is to be divided amongst them share and share alike ; but in case any of them shall have died leaving issue such issue to take the share that his, her, or their parent would otherwise have taken.

I think the meaning of the words “until *they*, or the survivor or survivors of them, attain the age of twenty-one years” is, until the youngest survivor of them shall attain that age. If the words had been, until they shall attain the age of twenty-one years, this would mean until all of them should attain that age, which would necessarily mean until the youngest of them should become twenty-one. Then the use of the further words, “or the survivor or survivors of them,” seem to make the signification as I have said until the youngest survivor of them shall attain that age. The period or point of time thus designated may turn out to be uncertain in a sense by reason of deaths occurring in the meantime ; but I think this is what is meant by the words, and I also think it is what the testator actually meant. I think that in this particular respect the language of the will points to the earliest period or point of time at which all the survivors of the four shall be at or over the age of twenty-one years. The lands are, I think, directed to be held in trust until this period when they are to be divided amongst the survivors of the four children with the provision that the issue (if any) of any of them who may have died, leaving issue, shall take the share that the parent, if living at the time, would have taken.

This gift seems to me to be a gift in favor of a class, the reason for using the names of these four children being to distinguish them from the other children that were provided for in another way, and the provision in the will respecting any child or children that might be born after the testator's death seems to me strongly to support this view. If these four had been the only children of the testator the same gift might have been (so far as I can see) made in favor of his children, with the provision in respect



of any child or children that might be born after his death and the one in favour of the issue of any of them, who might have died before the period leaving issue.

This gift is, as I have said, in my opinion, in favor of a class. The period of distribution is, as I have also said, in my opinion the earliest point of time at which the youngest survivor of the class shall be twenty-one years of age. At this period the members of the class are to be ascertained. The gift in favor of the issue, if any, of those who in the meantime have died, can, I think, scarcely be considered in the light of what is commonly called the "gift over," such issue must I think be living at the period of distribution in order to take under the gift, they would I think in the case provided for be members of the class taking amongst them the share that the parent would have taken if living at the time, and unless the meaning is controlled by some part or parts of the will, I am of the opinion that the interests under the gift are contingent and not vested interests, the contingency on which they depend being, living or surviving to the period of distribution.

The same period of distribution, is, I think, by the will fixed in regard to the personal property. This appears in the clauses that I have above numbered 4 and 7 respectively, taken and read in conjunction with the provision contained in clause mentioned 6 above. The meaning that should be attached to the words in clause 4 above, "during the infancy of my said last mentioned four children," seems to be indicated by the words that immediately follow them namely, "and upon the youngest of them or the survivor or survivors of them attaining the full age of twenty-one years to divide" &c. I am of the opinion that the gifts of the personalty are to a class (the same class) and that if no other parts of the will control the meaning, the interests taken under these gifts are also contingent and not vested interests, the contingency upon which they depend being the same as above stated, the living or surviving till the period of distribution.



So far as I have been able to apprehend there is no part of the will by which it can be contended that the meaning above stated is controlled excepting the provision contained in clause numbered 3, above, respecting maintenance, support and education. This, or rather these, are given out of the income to be derived from time to time out of the real and personal property not otherwise devised or bequeathed.

In *Simpson* on Infants at p. 243 the author in discussing the subject says: "On this principle if a legacy be given to the child when he attains twenty-one, and the whole of the income is given for maintenance, the gift is vested, but it is the giving of the interest which effects the vesting of the legacy, not the giving of the maintenance. Accordingly a direction to supply maintenance out of the interest will not make a vested gift, nor a separate and distinct gift of maintenance though it may be equal in amount to the interest." The same proposition may be gathered from many other books and cases. See *Theobald* on Wills, 3rd ed. 386, 387, *et seq.*

Applying these rules to the gift for maintenance in this case it clearly has not the effect of vesting the interests or showing that they are vested, and I am of the opinion that they are contingent and not vested as above stated.

The further question is, as to whether or not Peter James Cooley, who has already attained full age, is entitled still to maintenance and support by virtue of the gift that is set forth in clause numbered three, above. This gift provides for the maintenance and support as well as the education of the four children during "their minority." Peter James Cooley is one of these, but he is now over age, though the others are yet under age. The gift being for education as well as maintenance would of itself tend to shew that the intention was that it should be for and during the minority of each, for one can scarcely suppose that the testator intended that the education—the word being used in its ordinary sense—would continue to the age which Peter James will attain before the youngest of the four attain twenty-one, should they both live so long; but

the will does not leave one this only by which to determine the question. It will be observed, as was stated in the argument, that the oldest three of these children are boys, and the provision contained in the latter part of clause numbered four above in respect of advances that may be made upon any one of the four children attaining twenty-one years for the purpose of establishing such child in some business or professional pursuit, if there were nothing else, indicates, I think, plainly that what is meant by the clause respecting maintenance is only a provision for maintenance of each of the four children during his or her minority; and I am of the opinion that Peter James Cooley is not entitled under this gift in the will to maintenance, support, &c., now that he is over twenty-one years of age.

The foregoing are the views that I have taken in respect of the matters in contention that I was asked to decide, and I do not know that anything further in respect to this will or the meaning of it is now required.

The costs of all parties will be out of the estate, and the executors will have *trustees' costs*.

A. H. F. L.

---

## [CHANCERY DIVISION.]

## ALEXANDER ET AL. V. THE CORPORATION OF THE TOWNSHIP OF HOWARD.

## GALBRAITH V. THE CORPORATION OF THE TOWNSHIP OF HARWICH.

*Municipal Act—By-law—Drainage—Formalities required—Omitting to move to quash—Void by-law—Judgment—Parties—Joinder of certain land-owners in action for damages arising from drainage works—46 Vic. ch. 18 (O.), secs. 333, 335, 340, 584, 589.*

Sec. 589 of the Consolidated Municipal Act 1883, 46 Vic. ch. 18 (O.), does not authorize the passing of a by-law for cleaning out or improving a drain without the due observance of the formalities mentioned or referred to in sec. 584. It must be read in conjunction with the respective sections mentioned in it.

Where, therefore, the defendants purported to pass and act upon a by-law for the cleaning out or improvement of the McG. drain, and the assessment of certain persons for the necessary costs, and this without any petition being presented therefor, or any assessment of an engineer, or any statement by an engineer of the proportion of benefit to be derived from the work by any lot or part of a lot of land, and without publishing the by-law or assessment, or the holding of any court of revision to which appeals from the proposed assessment might be made.

*Held* that such by-law was unauthorized and illegal, and that being a void proceeding an attack upon it was not prevented by secs. 333, 335, or 340 of 46 Vic. ch. 18 (O.) as to quashing by-laws; and also that though the plaintiffs in this action were not moving to quash the by-law or suing for damages under it, but only asking for a declaration that it was illegal, and an order restraining the defendants from collecting from them the assessment thereunder, and compelling them to remove the charge thereunder upon the plaintiffs' lands, they were entitled to have it declared that they were not liable to pay the assessments against them under the by-law in question, on the ground that the same was illegal and a void proceeding.

The plaintiffs brought this action as land-owners injuriously affected by certain drainage works of the defendants and the assessments made under by-laws relating to the same, seeking damages and other relief.

*Held* that there was no misjoinder of plaintiffs, nor was it incumbent on the plaintiffs to sue on behalf of any others, and also that the plaintiffs had the right thus to proceed by way of action and not of arbitration.

THESE actions were brought for damages alleged to have been sustained by the plaintiffs through certain drainage works constructed by the defendants the Municipal Corporation of the township of Harwich, and incidental thereto, under the circumstances, which are fully set out in the judgment.

The two actions were tried together before Ferguson, J., at Chatham, on December 7th, 8th, 9th, and 11th, 1886.

*Matthew Wilson and J. B. Rankin*, for the plaintiffs. The by-law for the McGregor Creek drain was passed under the Act of 1866, 29-30 Vic. ch. 51, secs. 281-2, (Can.) and that Act must govern the work: *Corporation of Dover v. Corporation of Chatham*, 11 A.R. 248. Under that Act (sec. 282, sub-sec. 6,) the defendants might have constructed the drain into Harwich, far enough to carry the water beyond the limits of Howard. That means far enough to carry it *so as not to do damage* to the adjacent lands. The evidence shows that the drain overflows through want of a sufficient outlet. This is negligence on the part of the defendants causing damage to the plaintiffs, for which an action will lie: *Northwood v. The Corporation of the Township of Raleigh*, 3 O. R. 347; *McArthur v. The Corporation of the Town of Collingwood*, 9 O. R. 368. Moreover, in the construction of these works the defendants are in the position of trustees, and must see to the proper application of the money passed. Here the defendants raised the money from the plaintiffs and others but never completed the drain. The defendants should be ordered to complete it: *Smith v. The Corporation of the Township of Raleigh*, 3 O. R. 405; *Morrow v. Connor*, 22 C. L. J. 348. Even if completed now, it was negligence on the part of the defendants not to have it done sooner. The negligence is aggravated and injury increased by the construction of the Harrison and Crouch drains above, and the McCoy and Alexander drains below, and by the cleaning out of the McGregor Creek drain above but not below, and thereby flooding McGregor Creek. These four drains should have been carried to a proper outlet so as not to injure the plaintiffs.

The by-law of 1883 is bad and void. A local assessment cannot be made for the repairs of a drain constructed under the Act of 1866, 29-30 Vic. ch. 51. That Act provides (sec. 282, sub-sec. 16) that *after completion* the drain shall be kept in repair *by the municipality*. In the first place the drain

was not completed, and therefore no liability to repair arose; next, even if completed, a local assessment cannot be made, as it is not expressly authorized. These Acts are construed strictly. The Act has since been amended to cast the burden of repairs upon the lands benefited, (46 Vic. ch. 18, sec. 584 (O.)) but the latter Act should be applied only to drains constructed after it had been passed: *Hardcastle* on Statute Law, p. 195; *Maxwell* on Statute Law, pp. 246, 267; *Martindale v. Clarkson*, 6 A. R. 1. We also refer to *Canada Atlantic R. W. Co. v. The Corporation of the City of Ottawa*, 8 O. R. 183, 201; *Re Corporation of Essex and the Corporation of the Township of Rochester*, 42 U. C. R. 523; *Corporation of Chatham v. Corporation of Dover*, 5 O. R. 325; 46 Vic. ch. 18, sec. 586; 47 Vic. ch. 32, sec. 19; 48 Vic. ch. 39, sec. 27; 49 Vic. ch. 37, sec. 28. (O.)

If the by-law is held to be valid, then the plaintiffs want an account of the \$2,000 raised under it.

*Pegley*, for the defendants. On the merits the defendants have shown the works to be properly done. The action is wrongly instituted. The plaintiffs have not a joint right, but (if any) a several right, and cannot be joined. The Court cannot order the defendants to make an outlet in the absence of the council of Harwich, as Harwich must contribute towards the expense, (49 Vic. ch. 37, sec. 31 (O.)) Harwich is a necessary party. At the time the plaintiffs demanded an outlet, the defendants had no power to give it. That power was not given until 49 Vic. ch. 37, sec. 27 (O.), and the Court could not order the defendants to do what they had no power to do. As to the Harrison and other drains, the defendants were confined by the petition to a particular work; they could not carry the outlet further than the petitioners asked, (46 Vic. ch. 18, sec. 570). There was no power under the Act of 1866, 29-30 Vic. ch. 51, to carry the water farther into Harwich than to relieve Howard, therefore Galbraith at least must look to Harwich for an outlet.

The plaintiffs' only remedy is by arbitration, 46 Vic. ch. 18, sec. 591 (O.); *McGarvey v. The Corporation of the Town of Strathroy*, 10 A. R. 631.



The plaintiffs are estopped by their petition for redistribution of the assessment made for the cost of the repairs. They also stood by and acquiesced in the original work since 1869, and in the by-law for repairs since 1883.

The by-law is valid. It is governed by section 584 and 589 of 46 Vic. ch. 18. (O.) It has never been quashed, and became validated under 46 Vic. ch. 18, section 573, and other sections requiring by-laws to be moved against within a year. Debentures have been issued and are held by innocent parties.

*Wilson*, in reply. The plaintiffs can join in the action, although the damages in the Master's office or before the jury, must be assessed to them severally, O. J. A., Rule 89 ; *Booth v. Briscoe*, 2 Q. B. D. 496.

Harwich is not a necessary party. The defendants (and not Harwich) injured the plaintiffs and are liable. If the defendants are entitled to contribution from Harwich, they should have brought Harwich in as a third party.

The defendants always had power to make an outlet. In any event they had power to do the work petitioned for and proposed by the by-law, which was abandoned. If they had no power to construct the outlet and protect the plaintiffs, they should not have begun the work. If the Court could not now order them to make the outlet, it could restrain them from conveying the water upon the plaintiffs' lands. Even if the defendants could not relieve Galbraith, he being in Harwich could not arbitrate with Howard, and would therefore have a right of action.

The remedy by arbitration only applies where the defendants' acts are lawful, and does not apply where they are guilty and the injury is the result of negligence : *Preston v. The Corporation of the Town of Camden and Gore*, Court of Appeal, February 1st, 1887, not yet reported. (a)

(a) This was an appeal from the judgment of Rose, J., pronounced on April 16th, 1886, in favor of the plaintiff. The appeal was allowed, with costs : 14 A. R. 85.

The plaintiffs are not estopped. The defendants did not act upon the plaintiffs' petition, or change their position in consequence of anything the plaintiffs did.

If the by-law for repairs is governed by secs. 584-9, of 46 Vic. ch. 18, (O.) it is still invalid, because those sections require all the formalities (except probably the petition) mentioned in secs. 570-1, 2, since the distribution upon the lots and roads of the assessment for repairs has never been made by an engineer.

The defendants cannot avail themselves of the validating clauses of the Act, because their by-law was never promulgated or published. Moreover, this is not a motion to quash. The plaintiffs are resisting the collection of taxes, and the defendants must show a lawful right. The Court can incidentally try the validity of a by-law at any time without a motion to quash. The plaintiffs have this common law right independent of the right to quash : *Sutherland v. The Municipal Corporation of the Township of East Nissouri*, 10 U. C. R. 626 ; *Harrison's Municipal Manual*, 2nd ed., notes to pp. 550, 560-1. The by-law is void ; *Re Funston and the Corporation of Tilbury East*, 11 O. R. 74. It is so unjust as to be discriminating when considered in the light of McDonell's evidence, and if discriminating it is void : *Regina v. Pipe*, 1 O. R. 43.

January 31st, 1887. FERGUSON, J.—The plaintiffs are Robert Alexander, James Alexander, and Alexander Clarke. The other two plaintiffs, Euphemia Cameron and A. B. Cameron, were, by an amendment allowed upon consent at the trial, left out of the case.

The plaintiffs are respectively owners of or interested in respective parcels of land in the westerly part of the township of Howard, through or near which runs a large drain in a westerly direction, which drain is commonly called "The McGregor Creek drain."

This drain was constructed, or rather commenced, by the defendants, who are the municipal corporation of the township of Howard, in the year 1868 or 1869, professedly

under and in pursuance of the various provisions of the Municipal Acts then in force respecting drainage and local assessments therefor.

The township of Harwich adjoins the township of Howard, and lies on the westerly side thereof. This drain was constructed through a part of the township of Howard to accumulate and carry the surface water off a large tract of private lands and public road allowances in Howard in a westerly direction through or near the lands of the respective plaintiffs and into the township of Harwich.

The plaintiffs allege that if the defendants had properly complied with the provisions of the said Acts they could have carried such water past the lands of the plaintiffs, and into the township of Harwich a sufficient distance to convey it away from and westward of the town line between Howard and Harwich, and could have charged and collected from Harwich a large sum of money for the work done in Harwich, and that after the completion of the work, in a proper manner, the corporation of Harwich could have been compelled to preserve and keep and would have kept the portion of the drain in Harwich in repair, so as to relieve the lands of the plaintiffs and others in Howard near the town line of most (if not all) of the water brought down by the drain, and they complain that the defendants, assuming to act under the provisions of the statutes, by local assessment, levied taxes from them, the plaintiffs, for the construction of the drain, and yet acted so carelessly and negligently in the construction of the drain, and in the work done therein, and particularly that portion thereof through and near the lands of the plaintiffs and across the town line and in Harwich, that a very large quantity of water was conducted to the lands of the respective plaintiffs for which no proper or sufficient outlet was given, and that by reason thereof the plaintiffs' lands were continuously flooded with water whereby they suffered great damage and injury.

The plaintiffs also say that the defendants assumed to charge the township of Harwich, and that the engineer of

the defendants, and arbitrators appointed by them, fixed a large sum of money to be paid by Harwich to Howard, to be expended in the construction of the drain, on account of the benefit that the roads and lands in Harwich would derive from the same if properly constructed, as was proposed. And they complain that the defendants acted with such carelessness and negligence in taking their proceedings under the Act, and in the construction of the portions of the drain across the road allowance at the town line and in Harwich, that the roads and lands in Harwich did not derive the contemplated benefit from the work, and that the township of Harwich refused to pay such money to the defendants, and the defendants did not collect the same from Harwich, and that by reason of this the plaintiffs and others in Howard were charged by the defendants by local assessment and compelled to pay for the whole of the work both in Howard and Harwich, as done by the defendants, without any assistance from the corporation of Harwich; and that the defendants so carelessly, negligently, improperly, and insufficiently did the work prepared and laid out across the road allowance of the said town line and in the township of Harwich, and left the same in such an incomplete state, that the corporation of Harwich would not complete the same or keep the drain cleaned out even to the extent to which it was originally constructed by the defendants; and by reason of the soil and debris and other matter being carried down the drain and filling the same, the outlet, which was from the beginning insufficient, became worse from year to year, and the lands and crops thereon of the plaintiffs became more and more injuriously affected, and yet the defendants neglected and refused to fully complete the drainage work or properly clean out or repair the same, or make a proper outlet for the water brought down to and upon the plaintiffs' lands.

The plaintiffs also complain that the defendants, from time to time, after the construction of the McGregor Creek drain (to the extent to which it was constructed), constructed



other large drains carrying great bodies of water, and emptying the same through part of Harwich, west of the plaintiff's lands, into the then insufficient outlet for the former drain, without improving such outlet, and by means thereof still further impeded the flow of the water from the lands of the plaintiffs, and also constructed from time to time (after the making of the McGregor Creek drain to the extent to which it was made), other large drains carrying great bodies of water, and emptying the same into the McGregor Creek drain east of the plaintiffs' lands, and by means thereof caused still more waters to flow upon, and injuriously affect the same, and the crops thereon.

The plaintiffs (after stating patient long-suffering on their part) further complain that in or about the spring of 1883, the defendants, after repeated requests and petitions, procured an examination and report by an engineer, who at the defendants' request made plans, specifications and estimates of such a work as would relieve them (the plaintiffs) and others along the McGregor Creek drain, and made an estimated assessment of the lands and roads that would be benefited by such work, and that the defendants, after having adopted such report, plans, estimates and assessments and provisionally passed and published a by-law for the construction of such work and the raising, according to such assessment of the money, \$7,493, required therefor, abandoned the work at the instance, or by reason of the influence of persons whose lands were lying eastward of the plaintiffs' lands, and from which the waters were collected and brought down by various drains constructed, as aforesaid, after the construction of the McGregor Creek drain, and who were liable to be assessed for the construction of the then proposed work—most of them being electors in the township of Howard : and that afterwards in the autumn of 1883, upon *the request of only two persons*, the defendants pretended to pass a by-law for the cleaning out, repair, and enlarging of that part of the McGregor Creek drain in Howard, and for charging and levying by local assessment against the lands of the plain-



tiffs and such others in Howard only as were assessed for the original construction of the McGregor Creek drain and in the proportion of such original assessment, the costs of such work, and issued debentures and raised under such pretended by-law over \$2000, and charged the repayment thereof against the said lands in said proportions so that the lands are incumbered therewith as with taxes, and have collected (as taxes are collected) parts thereof from the plaintiffs and threaten and intend to collect the whole thereof by local assessment. For this work no petition was presented, nor was any engineer instructed to make, nor did any engineer make, an assessment; nor was any engineer instructed to state, nor did any engineer state, the proportion of the benefit to be derived from the work by any lot or portion of lot. And the plaintiffs say the assessment is grossly disproportionate and manifestly unjust, and that the formalities, conditions precedent to the validity of such by-law were not complied with; and that neither the by-law nor the assessment was published, and no Court of Revision was held to which appeals from proposed assessments might be made.

The plaintiffs also complain that the deepening and enlarging of the McGregor Creek drain in the years 1883 and 1884, had the effect of bringing down upon them larger quantities of water, and of bringing the water down more rapidly than before, and that there being no sufficient outlet for these waters, they were injured thereby.

The plaintiffs also complain of the misapplication by the defendants of part of the moneys raised for the original construction of the McGregor Creek drain, and also part of the said sum of \$2,000 raised under the by-law of 1883.

The plaintiffs claim damages for the injuries they have, as they say, sustained, and a reference to ascertain the amount of the same: an order directing the defendants to carry the water brought down to or upon the lands respectively to a proper outlet without injury to the lands or crops of the plaintiffs, or restraining the defendants from bringing down such water, or expediting the flow thereof:

an order upon the defendants to account for the moneys received by them for the construction of the McGregor Creek drain, and for the moneys they should have received from Harwich, and to refund the sums diverted by them : an order upon the defendants to compel them to fully make and complete the McGregor Creek drain : an order declaring the by-law for repair of the drain illegal, and restraining the defendants from collecting from the plaintiffs the taxes or assessments thereunder, and compelling the defendants to remove the charge thereunder from the lands of the plaintiffs : if the by-law or assessment be legal, then an order that the defendants account for the moneys received thereunder, and refund the amount diverted, and apply the sums so refunded to the purposes of the drain, or repay them to the plaintiffs and others entitled thereto, or to amend the by-law so as not to raise more than enough to do the work authorized thereby ; and an order directing that the defendants shall maintain and keep the drain (the McGregor creek drain) when fully made and completed, within its own limits to at least the middle of the allowance for road at the town line.

They also claim general relief and costs, and they say that if necessary, they ask relief on behalf of themselves, and all others assessed or charged for the drainage works.

The defendants in their defence say that the McGregor Creek drain was constructed under a by-law passed with all the formalities required by the Act relating to municipal institutions then in force, and that it not having been moved against or quashed it was and is a good, valid, and subsisting by-law. This does not seem to be denied by the plaintiffs, so far as the by-law is concerned. They also say that this drain was properly constructed under and according to the plans, profile, and estimate prepared for the same, and referred to in the by-law.

By the third paragraph of the defence they say that they became notified that the drain was out of repair, and the costs of the required repair being more than the defendants deemed it proper to raise in one year, they passed a by-law

to raise the amount necessary to repair the drain by the issue of debentures of the municipality, as they were by the Municipal Act empowered to do, charging the lands according to the original assessment for the construction of the drain, and by the fourth paragraph they say that no application was made to quash this by-law, that the plaintiffs having acquiesced in it and paid the assessments under it are estopped and cannot question the regularity or legality of it.

They set up that the outlet of the drain was carried as far into the township of Harwich as the defendants had any right or authority to go with the same, and a sufficient distance to carry the waters brought down the drain beyond the limit of the township of Howard.

They deny all charges of negligence or neglect of duty and that any portion of the deficit charged against the lands in Harwich was ever charged against the plaintiffs' lands. They say that the plaintiffs' remedy (if any) is by arbitration and not by action.

They say that the township of Harwich is a necessary party to the action, and they object to the joinder of plaintiffs. They also say that the plaintiffs cannot sue on behalf of other parties interested in the drain and that they have themselves no right to maintain this action.

Upon the evidence I find the McGregor Creek drain was not, nor has it hitherto been constructed and completed according to the report of the engineer in respect of the same, which was adopted by the council of the township of Howard. It was, as appears by the evidence, many years in course of construction, and there is no pretence, even on the part of the defendants, that it was completed until the year 1881, in which year the engineer, Mr. Scane, made a report to the council in which he stated that the work was completed according to the profile and specifications. Mr. Scane had before this made several reports respecting the condition of this drain. He was called as a witness, and speaking in reference to his report, made the 19th of January, 1875, he says that at that time the work in Howard

was done according to the profile, but that in Harwich the stakes had been scraped out and he could not tell whether it was or not without taking fresh levels, but he thought it was as near right as it could be from looking over it. He says he does not know the reason the drain was not completed sooner than 1875, and that it could have been completed much sooner. He says he made a report in 1879 regarding the drain and that at that time it was right, except that in some places it was scraped out instead of being dug out, and that these places were rounding on the bottom, and further on (strangely enough) he says, that at these places, where it was scraped out, even the middle of the bottom was not deep enough. He says that between the reports of 1879 and 1881 work had been done whereby the drain had been deepened in Harwich,

The witness, John Miller, was with Mr. Scane when he examined the work in 1881. He says there was one place not taken out deep enough by one foot, and that Scane passed the work without its being taken out and that it has never since been taken out to his knowledge. He says that Scane knew this when he passed the work in 1881. This witness, Miller, apparently had an interest in having the work passed by Scane. He says that he contended with Scane at the time that there was not so much as a foot to be taken out, and Scane finally said "Let it go." He cannot say what length of the drain required this foot to be taken out of the bottom, that the drain was then full of water, &c. I do not deem it necessary further to pursue the subject of the various reports made by Mr. Scane. His sense of hearing is apparently very defective and his evidence before me was not satisfactory whether wholly from this cause I do not say. There is much evidence showing, I think, beyond doubt, that this drain has not been up to the present time completed or nearly completed from a point at or near the easterly limit of the allowance for road at the town line between Howard and Harwich to the lower end of it in Harwich



I am of the opinion that upon the evidence it appears that before it can be said that this drain is made according to the profile and plan, that is to say, according to the original report, it should be deepened by between one foot and twenty inches, if not more, across the road allowance at the township line aforesaid, and for some distance into Harwich and in several places, and, as I think, the greater part of the way thence in Harwich to or nearly to the end of the drain. In this distance, however, there are places which the evidence, I think, shews are excavated to perhaps a sufficient depth, these containing, so to speak, ponds of water. The effect of this incomplete excavation of this part of the drain is, and for a long series of years has been, to back the waters brought down by the drain upon the lands of the plaintiffs; in other words, to prevent the waters brought down from getting away from the plaintiffs' lands as they would have done if the drain had been completed as it should have been according to the report and by-law, to the injury of the lands and the damage of the plaintiffs.

I also find upon the evidence that the drain called the Harrison drain, constructed by the defendants (which empties its waters into a drain formerly constructed known as the Crawford drain, which emptied its waters into the McGregor Creek, now into the McGregor Creek drain, and was enlarged at or after the time of the construction of the Harrison drain) has the effect of greatly increasing the quantity of water brought down to the plaintiffs' lands by the McGregor creek drain, and of accelerating the flow thereof, and that this increase of water is also prevented from passing away from the plaintiffs' lands, and backed up thereon by reason of the want of the required excavations aforesaid from a point at or near the easterly limit of the road allowance at the town line, westerly to, or nearly to the westerly end of the McGregor Creek drain, and for want of a proper outlet for such increased quantity of water, which outlet, I think, the defendants should have made or provided at the time of their making or construc-



ting the Harrison drain, or if they could not do so they should not have constructed the Harrison drain at all, and I think it plain that this operates an injury to the plaintiffs' lands and crops, causing damages to the plaintiffs, for which the defendants are responsible.

My finding upon the evidence in regard to the drain called the Crouch drain is the same as that in regard to the Harrison drain, although a description of the Crouch drain would be somewhat different. The waters of both these drains pass into the McGregor Creek drain above the plaintiffs' lands, and one of them has the effect of bringing some water into the McGregor Creek drain above the plaintiffs' lands, which otherwise would have found its way to the McGregor Creek at a point or points below the plaintiffs' lands. The McGregor Creek drain seems to have been dug mainly in the channel of the McGregor Creek.

Two other drains, called respectively the Alexander drain and the McCoy Drain, were constructed by the defendants. These respectively empty their waters into the McGregor Creek drain, at points below the lands of the plaintiffs, and in the township of Harwich. The contention was that these had the effect of causing the water to back upon the plaintiffs' lands to a greater extent than they otherwise would, and the defendants before or at the time of bringing the water down by these drains or either of them should have furnished a proper outlet for the same.

If the McGregor Creek drain had been properly constructed, and the necessary excavation been made in the part of it before mentioned from a point at or near the easterly limit of the allowance for road, at the town line, westerly, there is I think no doubt upon the evidence that the waters of these two drains, or of either of them would have the effect contended for by the plaintiffs, and this to a very considerable extent, there having been no increased outlet provided for these drains, as in my opinion, upon the evidence, was necessary. The case, however, is a little different when one takes into consideration the want of excavation in the McGregor Creek drain before mentioned,

because the earth that should have been excavated between the points where these drains meet the McGregor Creek drain and the plaintiffs' lands constitutes, so to speak, a dam penning the waters of the McGregor Creek drain back upon the plaintiffs' lands, which would be the case whether these other drains below had been constructed or not; but, looking at the whole evidence, and particularly the idea that it affords of the state or condition of the surface of the water along the McGregor Creek drain from the plaintiffs' lands downwards (west-erly), and the evidence as to the so-called outlets below the confluences of these two drains with the McGregor Creek drain, I am of the opinion that the waters of these two drains and of each of them has the effect contended for by the plaintiffs, that is to say, that the waters of these drains meeting the waters of the McGregor Creek drain as they do, cause, under the existing facts, a greater penning back or accumulation of water upon and at the plaintiffs' lands than would take place if these drains had not been constructed, and this to the detriment and damage of the plaintiffs. I am of the opinion, and I find that the defendants were guilty of negligence in the way that I have (in part) pointed out, in not properly constructing the McGregor Creek drain and in not constructing it within a reasonable time. That they were guilty of negligence in constructing each of the drains the Howard drain and the Crouch drain, and bringing the waters thereof, through the McGregor Creek drain, down upon the plaintiffs' lands without providing a proper outlet for the same, and that the defendants were also guilty of negligence in constructing each of the drains, the Alexander drain and the McCoy drain, without providing a proper outlet for the waters of the same, and that by reason of each of these causes the respective plaintiffs in this action have suffered injury and damages for which the defendants are liable and responsible. Judging from the portions of the evidence that tended to indicate the extent of these damages

to each of the plaintiffs I am not of the opinion that the damages are large, but the plaintiffs are persons who appear to be in, what I would say, are very moderate circumstances, making or endeavoring to make a livelihood off these lands, and the matter is, no doubt, of great importance to them respectively.

Then, as to the validity or not of the by-law passed in the autumn of 1883, to raise the sum of \$2,000 for the cleaning out or improvement of the McGregor Creek Drain, I find it to be true, as alleged by the plaintiffs, that in or about the spring of 1883 the defendants, after having been petitioned so to do, procured an examination and report of an engineer who, at their request, made plans, specifications, and estimates of such work as would relieve the plaintiffs and others along the McGregor Creek Drain and made an estimated assessment of the lands, &c., that would be benefited by the work, and after having adopted the report, plans, estimates, and assessments, and provisionally passed a by-law for the construction of the work and raising the cost thereof; \$7,493, by such assessment, for some reason abandoned the same, and that afterwards in the autumn of 1883 the by-law, the validity of which is now questioned, was passed by the defendants.

For the work mentioned in the by-law in question (the one to raise the sum of \$2,000) no petition was presented, nor was any engineer instructed to make, nor did any engineer make an assessment, nor was any engineer instructed to make, nor did any engineer make out or state the proportion of benefit to be derived from the work by any lot or part of a lot of land. Neither the by-law nor the assessment was published, and no Court of Revision was held to which appeals from the proposed assessment might be made. The contention of the plaintiffs was that these things were necessary to the validity of the by-law.

Under the by-law and proceedings for the original construction of the McGregor creek drain a sum was to be paid by the township of Harwich. This was settled by arbitration under the statute, the amount was, I apprehend,

to be raised by assessment upon those in Harwich whose lands, &c., were benefited, or to be benefited by the work.

Mr. Grant, the clerk of the council of Howard, in his evidence stated shortly how the by-law now in question was passed. He says this by-law No. 16, 1st December, 1883, was passed at the request of Mr. West and Mr. Gage just after the abandonment of the work under the McGeorge report by-law (the one for raising of the \$7,493). He says there was no petition, no Court of Revision, no opportunity to appeal, no advertisement or publication of the by-law, no assessment of lands in Harwich at all, that the assessment was upon the lands in Howard only that were originally assessed for the construction of the McGregor creek drain. He says that he himself (the clerk) made the assessment under the direction of the Council, and that in doing so his judgment was guided by the by-law for the original construction of the drain in 1868: that no part of Harwich was included in the assessment: that he did not notify the plaintiffs or any one else of the by-law, and that he was under the impression that West and Gage were both ratepayers in Harwich. (It is now said that only one of them was a ratepayer.) Under this by-law the defendants proceeded to collect the assessment so made by their clerk. The first year the plaintiffs, or one of them, paid the amount of the assessment under a promise that there should be a readjustment of it so as to place the burden upon the lands really benefited, or to be benefited. This not having been done, the plaintiffs refused to pay the second year's assessment. The collector, it appears, did not proceed to collect the money by distress or otherwise, and the defendants magnanimously subtracted the amount of it from his salary.

The defendants contend that section 589 of the Consolidated Municipal Act of 1883, 46 Vic. ch. 18, (O.), conferred upon the council the power to pass this by-law. This section provides that when the repairs required to be made under either section 584 or section 587 of the same Act are so extensive that the



Municipal Council does not deem it expedient to levy the cost thereof in one year, the council may pass a by-law to borrow upon the debentures of the municipality the funds necessary for the work, and shall assess and levy upon the property benefited a special rate sufficient for the payment of the principal and interest of the debentures, and that the by-law shall not require the assent of the electors.

Section 587 provides for a case wherein the work has been fully made and completed and the same has not been continued into any other municipality than that in which the same was commenced, or wherein the lands or roads of any other municipality are not benefited by the work. That is not the present case.

Section 584 provides that after any such work is fully made and completed, it shall be the duty of each municipality in the proportion determined by the engineer or arbitrators (as the case may be) or until otherwise determined by the engineer or arbitrators under the same formalities as nearly as may be as provided in the preceding sections of this Act, to preserve, maintain, and keep in repair the same within its own limits, either at the expense of the municipality or parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council upon *the* report of *the* engineer or surveyor may seem just.

This section seems to me to be the one of the two that are mentioned in sec. 589 that applies to the present case.

Then does section 589 authorize the passing of such a by-law without any of the formalities mentioned and referred to in section 584? I think it does not. It seems to me to provide only for the borrowing of money in such a case as it mentions for the purpose of making repairs and that it is to be read in conjunction with the respective sections that are mentioned in it, and if read in conjunction with or as additional to section 584 (the one that I think applicable in the present case) I do not see that it dispenses with the preliminaries or formalities that are mentioned in this section 584.



Before the passing of the by-law in question the defendants had procured the report of Mr. Scane dated in September, 1883, the one referred to in the by law. In this report Mr. Scane states that he had taken the levels of the McGregor Creek in the township of Howard commencing at the side road between lots 12 and 13 in the 5th concession and following the several courses as previously made to the town line between Howard and Harwich, giving various distances, and the fall, and stating the various dimensions in different parts. He also gives an estimate of the cost \$2,000, adding thereto the cost of survey \$20, and of selling and receiving \$50.

The by-law was passed on December 1st, 1883, adopting this report providing for the raising of the money, the issue of the debentures, and for payment of the same by levying and collecting in each year upon the lots and roads according to the original assessment for the McGregor Creek drain during the continuance of the debentures. As before stated the assessment was made by the clerk of the municipality by the direction of the council, he being guided by the by-law for the original construction of the drain in 1868.

For some reason a report bearing date the 5th September, 1885, was procured from a civil engineer, Mr. McDonell. This report states that it is made in accordance with instructions received from the defendants, requesting the civil engineer to make an examination of certain lands in the township of Howard, for the purpose of levying an assessment to defray the expenses of repairing the McGregor Creek drain in the township of Howard. This report finds that certain lands such as the south-west part of lot 17, parts of lots 15 and 16 on the town line range were assessed for the original construction of the drain, but could not be assessed for the then recent improvements, inasmuch as they drained into the creek below where the improvement had been made. The engineer then says: "As I am limited by instructions to confine the assessment to the lands originally assessed for the construction of the drain," then stating what lands,

he says "the amount required to be raised, which is \$2,000 will come very heavy on the above described territory." This report then finds that several other drains such as the Crouch drain, the Harrison drain, and the Crawford drain had been constructed after the construction of the McGregor Creek drain, and were using the McGregor Creek drain as an outlet draining some nine thousand acres of land into the McGregor Creek drain, and not paying a cent for the use of the outlet, which was a grievous wrong to the people who paid for the construction and maintenance of the McGregor Creek drain, inasmuch as the 9,000 acres of land should be taxed for a fair proportion of the then recent improvements on the McGregor Creek drain as well as with a fair proportion of the cost of the original construction of the same. The reason for obtaining this report is not, to me very clear, unless it was for the purpose of endeavouring to satisfy persons who had been complaining of the injustice of the by-law in question by some sort of redistribution of the assessment, and it is difficult to perceive any good reason for instructing the engineer to confine the assessment to the land originally assessed for the construction of the McGregor Creek drain.

Mr. McDonell says, that if his instructions had not been to so confine his report he would have included the lands on the Crouch and Harrison drains and other lands using the McGregor Creek drain as an outlet (some 9000 acres), and that he would not have placed any assessment on the lands in the town line range in Howard, as they were not in a position to be benefited by the improvement.

There is no pretence that the report for the original construction of the McGregor Creek drain contains anything regarding the maintenance of the drain. A copy of that report, which bears date the 13th day of May, 1868, was put in evidence. This is a certified copy of the report or copy that was served upon the head of the corporation of Harwich, presumably under the provisions of sec. 282, sub-sec. 10 of the Act of 1866, 29-30 Vic. ch. 51, and it appears to be silent upon the subject of the mainte-

nance of the then proposed drain, although sec. 282 sub-sec. 9 of the same Act provided that the engineer or other person should determine and report to the council by which he was employed whether the proposed deepening or drainage should be constructed *and maintained* solely at the expense of such township, or whether it should be constructed *and maintained* at the expense of both municipalities, and in what proportions. Sub-sec. 16 of the same section of the same Act provided that after the deepening or drainage was fully made and completed it should be the duty of each municipality to preserve, maintain and keep the same within its own limits, and in the case of neglect or refusal so to do, after notice the municipality was made liable to indictment, and also in respect to pecuniary damages. This Act of 1866 is the one under which the drain was constructed. Sec. 578 of the Act of 1883, 46 Vic. ch. 18, provides that the engineer or surveyor shall determine and report to the council by which he was employed whether the work shall be constructed and maintained solely at the expense of such municipality, or whether it shall be constructed and maintained at the expense of both municipalities, and in what proportions.

The provisions of section 584, of the Act of 1883, I have before referred to. As was remarked by Mr. Justice Osler in the case of *The Corporation of Chatham v. The Corporation of Dover*, 11 A. R. at p. 285, there are some things in the section that are not very comprehensible, but it seems to me that there must be a proportion of the expense of maintenance and repair of the drain determined by the engineer or arbitrators (as the case may be) under the formalities provided in the sections preceding this one, and that each municipality is to raise or provide the proportion assigned to it (for the purpose of maintaining the part of the work within its own limits) either at the expense of the municipality or the parties more immediately interested, or at the joint expense of both the municipality and such parties as to the council upon the report of the engineer or surveyor may seem best.

The report of Mr. Scane of September, 1883, referred to in the by-law in question is, in my opinion, not at all such a report as is contemplated by section 584. I think such a report is absolutely necessary before the passing of a by-law for the purpose for which the by-law in question was passed, and that for the protection of the persons concerned the formalities prescribed should be observed.

The report of Mr. McDonell, and his evidence given at the trial (which was, no doubt, correct), shews the great injustice of this by-law. I think it extremely unjust, and fears may, I think, be reasonably entertained that influences were brought to bear to procure the passing of it that were not of an entirely pure character.

It has not been made to appear that there was or is any report such as should have been before the passing of this by-law or that the formalities mentioned in 584 were at all observed. The contrary of these does appear, and I am of the opinion the by-law in question is unauthorized and illegal, and it is beyond doubt that it is extremely unjust.

It was contended that as no application had been made to quash the by-law the plaintiffs cannot now succeed in the contention that it should be declared void. The case cannot, I think fall within the provisions of section 333 of the Act of 1883 (which is the same in substance, if not in words, as the section 321 of the former Act, R. S. O. ch. 174) because this by-law was never published at all, nor can it in my opinion fall under the provisions of section 340 of the Act of 1883 (substantially the same as section 321 of the former Act.) In *Sutherland v. The Municipal Corporation of the Township of East Nissouri*, 10 U. C. R. 626, it was decided that a by-law substantially illegal cannot (subject to the provisions of the then section 321) afford any protection for what has been done under it, and that so incidentally its validity may in an action be decided upon at Common Law by a Common Law Court. In *Wilson v. The Corporation of Middlesex*, 18 U. C. R. at p. 352 it is said referring to the section (which was then sec. 201 of 22 Vic. ch. 99.)



"We do not think that that provision extends further than to prevent actions being brought for the recovery of damages in which it may be important to tender amends." I do not see either that the provisions of sections 335 of the Act of 1883 apply to the case. This is not an application to quash the by-law. I have examined a large number of cases in our own Courts on the subject of by-laws, and quashing the same, and I am of the opinion that this by-law is a void proceeding, and that an attack upon it is not prevented by any of these sections.

The late Chief Justice Robinson said, when refusing to quash the by-law in *Sutherland v. The Municipal Corporation of the Township of East Nissouri*, "It is a void proceeding and must be so pronounced if the legality of any act done under it should come to be questioned:" p. 627.

The defendants also contended that as the plaintiffs were not moving to quash the by-law, nor suing for damages for anything done under it they had no *locus standi*. I am, however, of the opinion that the plaintiffs are entitled to have their rights in the premises declared, that is to say to have it declared that they are not liable to be compelled to pay the assessment under the by-law, and that incidentally it must be held that the by-law in question is a void proceeding.

I do not know that the plaintiffs are entitled to recover back the one year's assessment paid by them. The evidence is that this was paid under a promise that there would be a re-adjustment of the assessment under the by-law. I do not think it can be said to be clearly a payment made under a mistake of fact, and besides it was not shewn that the promise given was a fraudulent promise. It does appear that some efforts were made towards a re-adjustment. It may well be that the promise itself was a consideration that would be recognized as such. This claim was not, however, finally strongly pressed by plaintiffs' counsel as I understood [him. As to the claim made for an account of the moneys received by the defendants for the construction originally of the McGregor Creek



drain, and of the moneys received under the by-law now in question, I virtually determined at the trial that a case was not made out, and I am of the same opinion still. Whether this occurred by misfortune in the evidence, or because the facts were really against the plaintiffs' contention in this respect I am not aware.

At the final argument plaintiffs' counsel did not urge that he was on the evidence entitled to this relief, neither did he abandon it.

I do not think that the contention that the plaintiffs' only remedy (if any remedy they have) is by arbitration under the provisions of the Act regarding arbitrations, nor do I consider the township of Harwich a necessary party to this suit, although perhaps the defendants might have brought them in as parties defendant under the provisions of the Judicature Act. I do not think that in joining the plaintiffs in this action the provisions of the Judicature Act have been violated. The plaintiffs have, I think, a right to maintain the action themselves, and they need not have sued on behalf of any one else. I do not see that they are estopped from so doing by reason of any of the matters put forward as ground of estoppel. I am of the opinion upon the evidence that the plaintiffs have suffered some injury by reason of what have been called the deepening and enlarging of the McGregor Creek drain (the clearing out of it) that took place after the passing of the by-law in question without the part of the drain on the road allowance at the town line, and the part of the drain in Harwich being cleaned out and enlarged in the same manner, and that the defendants are responsible to the plaintiffs for the damages arising therefrom.

The plaintiffs are entitled to a reference to ascertain the amount of the damages sustained by them, respectively, from the various causes in respect to which I have indicated that they have sustained injury, and are entitled to damages from the defendants. They are entitled to an order against the defendants for the completion of the McGregor Creek drain, and the providing by the defendants

of a proper outlet for the waters brought down by that drain and the other drains that have been constructed by the defendants, that I have before mentioned, so as to have their waters carried away through the McGregor Creek drain. As, however, counsel for the defendants conceded that the plaintiffs are entitled to a proper outlet for those waters, and said and endeavoured to shew that steps had already been taken to obtain or make such outlet, it will be sufficient at present to declare that the plaintiffs are so entitled as against the defendants, with leave to the plaintiffs to apply if these things are not done within a reasonable time, say by the first day of August next.

There will also be a declaration that the plaintiffs are not liable to pay the assessments against them under the provisions of the by-law in question, on the ground that the same is illegal and a void proceeding.

As to the order asked, that the defendants keep the McGregor Creek drain in repair in future, it is perhaps better not to make it, as when the works now contemplated by this judgment shall have been done the whole matter may bear a very different complexion. This, however, may be spoken to on settling the minutes, if thought necessary.

The plaintiffs are entitled to their costs of the action, to be paid by the defendants. Further directions and subsequent costs are reserved till after the Master shall have made his report. Reference to the Master at Chatham.

---

#### GALBRAITH v. HOWARD.

THIS action was tried with the action *Alexander et al. v. The Corporation of the Township of Howard*. The parties were represented by the same counsel. The lands of the plaintiff Galbraith are situated in the township of Harwich, and the McGregor Creek drain

passes through them. The Alexander drain and the McCoy drain are brought into the McGregor Creek drain upon or near his lands. In the other action I found that the McGregor Creek drain was not completed. I now find that it was not completed through the lands of this plaintiff, and that by reason of its not having been completed through his lands, and westerly thereof towards the mouth or outlet of the same, he has suffered injury and sustained damage and loss. I also find that by the construction by the defendants of the Alexander and McCoy drains so as to empty their waters into the McGregor Creek drain in the manner in which they do, without providing a proper outlet for the same, the waters have been backed up upon the plaintiffs' lands, and that the plaintiff has thereby suffered injury and loss.

The plaintiff is entitled to a reference to ascertain the amount of the damage that he has sustained from the causes aforesaid.

As to the completing of the McGregor creek drain and providing a proper outlet for the same and all the waters brought down by it as also for the waters of the Alexander and McCoy drains the plaintiff is entitled to the same declaration as that made in the other action, in these respects, and the same leave to apply.

The plaintiff is entitled to his costs to be paid by the defendants. Further directions and subsequent costs reserved. Reference to the Master at Chatham

A. H. F. L.

---

## [CHANCERY DIVISION.]

## RE WATSON AND WOODS.

*Will—Restraint on alienation—Invalidity—Vendor and purchaser proceedings—Costs.*

By his will P. T., after giving a life estate to his widow, devised lands to his son as follows, "that T. T. do inherit the same as his property on the conditions that he never will or shall make away with it by any means but keep it for his heirs."

*Held*, on an application under the Vendor and Purchaser Act, that the condition attached to the devise was invalid, being an absolute and unqualified restraint on alienation, and that there being in the opinion of the Court no doubt of the vendor's title, the purchaser should pay the costs of the proceedings.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 109, by Charles Watson, purchaser.

The petition set out that by an agreement of 15th February, 1887, entered into in writing between the petitioner and John Woods, the latter agreed to sell to the petitioner the lands above mentioned, on certain terms therein mentioned; that the petitioner had caused the title to be examined by a solicitor of this Court, who advised, *inter alia*, "that the vendor's immediate vendor, one Thomas Tracey, entered into possession of the lands through the will of his father, one Patrick Tracey, by which he is supposed to obtain title, and grave doubts exist as to whether the said Thomas Tracey could convey said lands to said Woods."

The will of the late Patrick Tracey is in these words:

"BROCKTON, January 25th, 1869.

"Will of Patrick Tracey, made the 25th day of January, 1869: I consign my body to the dust and soul to God Amen. This is to certify that I, Patrick Tracey, of, &c., \* \* do consign and make over to my wife, Johanna Tracey, all I inherit, that is to say, one acre of land with house and improvements thereon for a maintenance for her, during the remainder of her life; and after her death that my youngest son, Thomas Tracey, do inherit

the same as his property, on the conditions that he never will, or shall make away with it, by any means, but keep it for his heirs ; and my son, Thomas Tracey, do bear any funeral expenses that shall be required for her, after her death.

“ PATRICK TRACEY, his X mark.

“ Witness : EDWARD MCKENNA,  
PATRICK LAPPIN.”

The testator departed this life without in any way revoking or altering this will, leaving him surviving his widow, since deceased, and his son Thomas, the devisee, who, on January 28th, 1887, conveyed, by the ordinary statutory short form of conveyance, the lands in question to the vendor, Woods.

The question submitted was, whether, under the above devise, Thomas Tracey had the right so to convey to Woods.

The matter came up for argument before Robertson, J., on April 27th, 1887.

*G.H. Smith*, for the purchaser, cited *Doe d. McIntyre v. McIntyre*, 7 U.C.R. 156 ; *Scouler v. Scouler*, 8 C.P. 9 ; *Bartels v. Bartels*, 42 U. C. R. 22 ; *Hamilton v. Dennis*, 12 Gr. 325 ; *Lundy v. Maloney*, 11 C. P. 143 ; *Pennyman v. McGrogan*, 18 C. P. 132 ; *Dougherty v. Carson*, 7 Gr. 31 ; *Macdonell v. Macdonell*, 19 U. C. R. 130, 2 E. & A. 341 ; *Smith v. Faught*, 45 U. C. R. 484 ; *Earls v. McAlpine*, 6 A. R. 145.

*A.H. Marsh*, for the vendors, cited *In re Rosher*, *Rosher v. Rosher*, 26 Chy. D. 801 ; *In re Macleay*, L. R. 20 Eq. at p. 189 ; *Challis on Real Property*, pp. 130-2.

April 29th, 1887. ROBERTSON J. (after stating the facts as above).—The question now submitted is—Had Thomas, the devisee, the right to convey in fee simple to Woods ? Or is the condition attached to the devise to him, a valid restraint on alienation ?



I am clearly of opinion that the condition attached to the devise, which is one in fee simple, is not a valid restraint on alienation, but is void for the reason that it is an absolute and unqualified restraint on alienation. The words of the condition are : " That he never will or shall make away with it by any means, but keep it for his heirs." Thomas Tracy, therefore, had the right to convey in fee to the present vendor.

The condition restricts the alienation in every way ; in other words it takes away the whole power of alienation ; it is not restricted to any particular class, nor to any particular time. He, the devisee, is not permitted to convey or devise to any particular heir, not even the heirs of his body, but it is to be kept for his heirs.

Sir George Jessel, M. R., in *Re Macleay*, L. R. 20 Eq., at p. 188, says : " The law on this subject is very old, and I do not think it can be better stated than it is in *Coke* upon Littleton, in *Sheppard's Touchstone*, and other books of that kind, which treat it in the same way." Littleton says, (p. 222 a.) : " If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void: *because when a man is enfeoffed of lands, or tenements, he hath power to alien them to any person by the law.* For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." Then he says, (p. 223 a.) : " But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." The Master of the Rolls then says : " So that according to Littleton, the test is, does it take away all power of alienation ? " Apply that test to the condition here, and what is the answer ? " He never will or shall make away with it by any means, but keep it for his heirs." The condition therefore is void. The case of *Smith v. Faught*, 45 U. C. R. 484, cited by

Mr. Smith, is an authority against his contention. There, it is true, it was held that the condition was a valid restraint upon alienation, but there the devise was accompanied by a condition in these words: that the devisee should "not sell, or cause to be sold, the above named lot, or any part thereof, during her natural life; but she shall be at liberty to grant it to any of her children whom she may think proper."

Hagarty, C. J., in delivering judgment, says, at p. 488: "I am of opinion that the restraint on sale is good—it is limited in its effect—and that it is reasonable. As I read the will, an estate in fee is devised to the married daughter. She then had and has children. She is allowed to grant as large an estate to any of her children as she had herself. She is simply restrained during her life from selling it to any other."

In *Re Winstanley*, 6 O. R. 315, the condition attached to the devise was in these words, "that she shall not dispose of the same only by will and testament." Held, that the devisee took an estate in fee simple, which was, however, restricted by a condition against alienation in any manner except by a testamentary instrument; and that such restraint was valid.

In the Tracey devise, the condition does not permit even a testamentary disposition.

I am of opinion, therefore, that Patrick Tracey having devised the land in question, in remainder, after the decease of his widow, to his son Thomas in fee simple, subject to a condition which precludes alienation in every form, that such condition being in restraint of alienation, is void. As to costs, I will adopt the reasons given by Jessel, M. R., in *Osborne v. Rowlett*, 13 Ch. D., at p. 798, as most applicable to this case: "I do not consider that because a particular title may be one which a conveyancer would not recommend a purchaser to accept without a decision of the Court, the purchaser ought not to pay costs, if the Court is of opinion that a good title can be made; on the contrary, the general rule is to order the purchaser to pay the

costs, so as to assure his title and shew that the Court entertains no doubt upon it."

In this matter then, as in my judgment, there is no doubt as to the vendor's title, the purchaser should pay the costs.

A. H. F. L.

---

[QUEEN'S BENCH DIVISION.]

REGINA V. DUNNING.

*Weights and Measures Act—42 Vict. ch. 16, (D.), and amendment—Crime—Evidence of defendant—Imprisonment—Jurisdiction—Certiorari—Conviction bad in part.*

The defendant was convicted by two Justices of the Peace under the Weights and Measures Act, 42 Vict. ch. 16, sec. 14, sub-sec 2, (D.), as amended by 47 Vic. ch. 36, sec. 7, (D.), of obstructing an inspector in the discharge of his duty, and was fined \$100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress.

At the hearing before the Justices the defendant tendered his own evidence, which was excluded.

The defendant appealed to the Quarter Sessions, and on the appeal again tendered his own evidence, which was again excluded, and the conviction affirmed.

On motion for *certiorari*,

*Held*, That the conviction having been affirmed in appeal *certiorari* was taken away except for want or excess of jurisdiction, and that there was no such want or excess of jurisdiction, inasmuch as the Justices and the Quarter Sessions had jurisdiction to determine whether the defendant's evidence was admissible or not, and that such determination, even if erroneous in law, could not be reviewed by *certiorari*.

*Per* ARMOUR, J. That even if the determination on this point could be reviewed the Justices were right in excluding the evidence of the defendant, inasmuch as the offence charged was a crime.

*Held*, also, [ARMOUR, J., dissenting,] that although irregularly directed imprisonment was justified in default of distress by sec. 62 of 32 & 33 Vic. ch. 31, (D.), incorporated in the Weights and Measures Act by sec. 53 thereof; but that if such imprisonment were not so justified the whole conviction would be bad, there being no power to amend by striking out the award of imprisonment.

*Per* ARMOUR, J. That the 32 & 23 Vict. ch. 31, sec. 62, (D.), should only be construed as fixing the duration of the term of imprisonment, where the special Act provides specifically for some imprisonment without fixing its duration; and that as no imprisonment is expressly im-

posed by the Weights and Measures Act for the offence charged here, so much of the conviction as awarded imprisonment was made without jurisdiction, and was therefore bad ; but that it was separable from the rest of the conviction, and should be quashed, leaving, however, the rest of the conviction to stand.

THE defendant was on the 2nd June, 1886, at the village of Cumberland, in the township of Cumberland, in the county of Russell, one of the United Counties of Prescott and Russell, convicted before two Justices of the Peace for the said counties, for that he, on the 24th March, 1886, at the said village of Cumberland, did unlawfully obstruct and impede John Cosgrove, Assistant Inspector of Weights and Measures, in the performance of his duty under the Weights and Measures Act of 1879, and amendments thereto, and was adjudged to forfeit and pay \$100, to be paid and applied according to law, and also \$15.95, costs, and if the same were not paid forthwith they were to be levied by distress, and in default of sufficient distress, defendant was to be imprisoned for three months unless the said several sums, with costs of the distress and commitment and of conveying defendant to gaol, were sooner paid.

From this conviction the defendant appealed to the Court of General Sessions of the Peace for the said counties, at L'Orignal, on 14th December, 1886, when the conviction was affirmed with costs.

It appeared by the affidavit of defendant that, both upon the hearing before the said justices and before the Sessions, his evidence, though tendered, was excluded, and he was not examined in his own behalf.

Defendant moved before O'Connor, J., in Chambers, for a *certiorari*, in order that the said conviction or order, and order of affirmance thereof, might be quashed on the following, among other, grounds: (1) That the adjudication of imprisonment was illegal and unwarranted and was in excess of the jurisdiction of the said justices. (2) That the offence charged against the defendant in respect of which the said penalty was recovered was not a crime or of a criminal nature, and the proceedings had before the



justices were in the nature of a civil action, and the evidence of the defendant was improperly rejected both by the convicting justices and by the said Court of General Sessions of the Peace.

The learned Judge refused the *certiorari*, and thereupon on the 10th of February, 1887, *Shepley, McDougall* with him, moved by way of appeal from the order of the said Judge, and for an order for a writ of *certiorari* for the like purpose, and on the like grounds, and also on the ground that no imprisonment was awarded as a punishment by the statute under which the defendant was prosecuted and convicted, and no punishment awarded under any other statute could be imposed or inflicted by the said justices or otherwise.

*Clement* shewed cause.

May 28, 1887. ARMOUR, J.—The defendant was convicted under sec. 41, sub-sec. 2, of the Weights and Measures Act of 1879, 42 Vic., ch. 16 (D.), as amended by 47 Vic., ch. 36, sec. 7 (D.), which provides that “If any person wilfully obstructs or impedes any inspector or assistant inspector in the performance of his duty under this Act, or under any order in Council, or departmental regulation lawfully made under it, such person and any person aiding or assisting the offender, shall thereby incur a penalty of one hundred dollars.”

By sec. 53 of the first-mentioned Act it is provided that “All forfeitures and penalties imposed by this Act, or by any regulation made under its authority, shall be recoverable, with costs, before any civil Court of competent jurisdiction, or before any Justice of the Peace for the district, county, or place in which the offence was committed, if such forfeiture or penalty does not exceed fifty dollars, and before any two such justices, or any magistrate having, by law, the power of two such justices, if it exceeds fifty dollars, upon proof by confession, or by the oath of one credible witness,—and may, if not forthwith paid, be levied by



execution or distress and sale of the goods and chattels of the offender, by warrant, under the hand and seal of such justice, justices, or magistrate, by whom also any imprisonment to which the offender is liable may be awarded; and to all such cases the Act passed in the session held in the thirty-second and thirty-third years of Her Majesty's reign, and intituled 'An Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders,' shall apply, subject to the provisions of this Act."

For an infraction of the provisions of sec. 30 of the first-mentioned Act, as amended by sec. 6 of the secondly mentioned Act, it is thereby provided that the infractor "shall incur a penalty of forty dollars for the first offence, and for each subsequent offence he shall incur a penalty of one hundred dollars and be liable to two months' imprisonment;" and this is the only instance in the Act where an offender is made liable to imprisonment; and this is the imprisonment which is referred to in sec. 53, in the words, "by whom also any imprisonment to which the offender is liable" (that is, liable by this Act) "may be awarded;" and these words do not refer to imprisonment as a mode of enforcing penalties imposed by the Act in default of distress, and no provision is made in the Act for such imprisonment.

The question then is, can imprisonment be awarded for enforcing the penalties imposed by this Act in default of distress, no provision for such imprisonment being made in this Act? and this depends upon the construction to be placed upon the Act 32-33 Vic., ch. 31, sec. 62 (D.).

By that section the defendant, in default of distress, may be imprisoned, or imprisoned and kept at hard labour, "in the manner and *for the time* directed by the Act or law on which the conviction or order mentioned in the warrant of distress is founded, unless, &c.; but if *no term* of imprisonment be specified in the Act or law, the period for which the Justice shall order the defendant to be so imprisoned shall not exceed three months."

I think it is essential to imprisonment under this section, in default of distress, that such imprisonment should be provided for in the Act or law upon which the conviction or order is founded. If such imprisonment is so provided and the time of it is specified in the Act or law, or if such imprisonment is so provided and the term of it is not specified in the Act or law, it can be awarded under this section ; but if such imprisonment is not so provided in the Act or law at all it cannot be awarded under this section.

In my opinion, therefore, the award of imprisonment in default of distress in the conviction in question was beyond the jurisdiction of the convicting justices.

Assuming it to have been so, can it not be quashed without quashing the conviction altogether ?

It is laid down in *Paley* on Convictions, at pages 160, 177, and 436, that an order may be good in part and bad for the residue, whereas a conviction is an entire judgment and indivisible ; if any material part be faulty it vitiates the whole, referring for the latter proposition to *Rex v. Catherall*, *Rex v. Salomons*, and *Rex v. Hale*.

In *Rex v. Catherall*, 2 Strange, 900, the defendant was convicted on the Kensington Turnpike Act for refusing to account and pay over the money by him received as collector, and being committed, and a *habeas corpus* brought, the defendant was discharged and the conviction quashed, because no particular sum was specified or the times when the money was charged to be received, so as to enable him to defend himself on a second charge ; and although the counsel for the trustees would have had the commitment stand as good to the not accounting, yet the Court said it was one entire *non feasance* charged both in the conviction and commitment, and they would not sever them.

In *Rex v. Salomons*, 1 T. R. 249, per Curiam : " The conviction is bad on another ground, for there is duplicity of charge. The defendant is charged with dealing in shares of lottery tickets, and with registering tickets without license, and he is convicted of the said offence, so that it does not appear of what offence he is convicted. A con-

viction must be good in all its parts, the information must be supported by the evidence, and the judgment must be supported by both. Here the defendant is charged with two distinct offences, each of which would subject him to a separate penalty, and supposing they could have both been included in one conviction, which is to be doubted, the defendant should have been convicted of both. A judgment for too little is just as bad as a judgment for too much.

In *Rex v. Hale*, Cowper, 728, the defendant had been convicted in treble the value of 520 lbs. of tea, upon an information exhibited before two Justices of the Peace, setting forth that the said tea had been seized as forfeited for unlawful importation, together with the packages, &c., and also a cart and two horses used in removing the same, &c., for that he the said John Hale did knowingly harbour, keep and conceal, and permit and suffer to be knowingly harboured, kept and concealed the said tea, &c., so unlawfully imported, contrary to the form of the statute, &c. The cart and horses and the tea were also by the same conviction adjudged to be forfeited, but the penalty of treble the value of the tea, which amounted to £681 7s. 6d., was mitigated to £190. Upon the conviction being moved into this Court by writ of *certiorari*, a rule was obtained to shew cause why the same should not be quashed. Upon shewing cause against the above rule, so much of the conviction as related to the penalty of treble the value of the tea was quashed, but the rest, as to the condemnation of the tea and the cart and horses, was adjudged good. N. B.—It seemed to be the opinion of Mr. Davenport, who was the counsel for the defendant, that a conviction could not be adjudged bad in part and good for the rest, but for the benefit of his client he consented to this mode of accommodating the dispute, and a rule was accordingly made as above. See also *Rex v. Patchett*, 5 East. 344.

There is nothing in any of these cases to shew that the award of imprisonment in default of distress in the conviction in question cannot be quashed without interfering with the rest of the conviction.

As I pointed out in *McLellan v. McKinnon*, 1 O. R. 219, the record of conviction may be said generally to consist of two adjudications; the one, the adjudication of guilt, and the other the adjudication of punishment; and I quite agree that the adjudication of guilt is an entire adjudication, and cannot be quashed in part and stand good for the residue; and such was the adjudication in *Rex v. Catherall* and *Rex v. Salomons*. What was done in *Rex v. Hale* may be put out of the question, as it was done by consent.

In the conviction in question there is a perfectly good adjudication of guilt, and a perfectly good adjudication of punishment, and a perfectly good award of distress for enforcing this punishment, but a bad award of imprisonment for enforcing the punishment—the payment of the penalty in default of distress.

I see no good reason why this award of imprisonment, which is merely subsidiary to enforcing payment of the penalty, and is quite severable from the rest of the conviction, should not be quashed without otherwise interfering with the conviction. It would be a reproach to the law if it could not be, especially in the view of the legislation that has taken place in support of convictions. See 33 Vic. ch. 27, sec. 2 (D.); 49 Vic., ch. 49 (D.).

It is clear that an order may be good in part and bad for the residue, and that this bad part may be quashed without at all interfering with the good part: *Rex v. Robinson*, 17 Q. B. 466; and there is no reason worthy of the name to be found in the books why there should be any distinction, in this respect, between an order and a conviction.

This disposes of the first and third grounds of appeal. It remains to consider the second ground.

The question whether the defendant was a competent witness in his own behalf was a question within the jurisdiction of the Justices and the Court of General Sessions of the Peace to determine, and we are not a Court of Appeal from their decisions; and however erroneously they may have decided we have no power to interfere.



In the *King v. The Justices of Cambridgeshire*, 1 D. & R. 323, the Court said the Court of Quarter Sessions are alone competent to exercise their judgment as to what witnesses are admissible, and what evidence is to be received; and if this Court was to interfere and grant a mandamus to them because they have admitted an interested witness, or have rejected a witness not interested, we should be going much farther than we have hitherto gone on any former occasion. See also *Regina v. Grainger*, 46 U. C. R. 382; *Regina v. The Justices of Middlesex*, 2 Q. B. D. 516; *Regina v. The Justices of Worcestershire*, 3 E. & B. 477 and 479, note *b*.

But I am by no means of the opinion that this defendant was a competent witness in his own behalf.

By the Consolidated Statutes of Upper Canada, ch. 32, which was the statute as to witnesses and evidence in force at the time of the passing of the British North America Act, "it was provided that nothing herein contained shall render any person, who, in any proceeding is charged with the commission of an indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself \* \* or shall, in any civil proceeding, render any person compellable to answer any question tending to criminate himself, or to subject him to a prosecution for any penalty." By sec. 91 of the British North America Act it is declared that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated;" that is to say, (17) weights and measures, (27) the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.

I am of opinion that prosecutions for offences under the Weights and Measures Act of 1879 must be governed by the law of evidence at the time of the passing of the British North America Act, and are not affected by the Ontario Act, R. S. O. ch. 62, which provides that (section 5) "Nothing herein contained shall render any person com-



pellable to answer any question tending to incriminate himself, or to subject him to prosecution for any penalty ;” and (section 9) “ On the trial of any proceeding, matter or question under the Liquor License Act, or under the Municipal Act, or under the Assessment Act, or under any other Act of the Legislature of Ontario ; or on the trial of any proceeding matter or question before any Justice or Justices of the Peace, Mayor, or Police Magistrate, in any matter cognizable by such Justice or Justices, Mayor, or Police Magistrate, not being a crime, the party opposing or defending \* \* shall be competent and compellable to give evidence in such proceeding, matter or question.”

But I think the offence of which the defendant was convicted was a crime. The defendant was convicted of unlawfully and illegally obstructing and impeding an assistant inspector of weights and measures in the performance of his duty, of a wilful contravention of a public general Act passed for the benefit and in the interest of the public at large, and the fact that a penalty only is imposed does not, in my opinion, make it the less a crime ; and by 31 Vic., ch. 1, sec. 6, sub-sec. 20 (D.), “ Any wilful contravention of any Act which is not made any offence of some other kind shall be a misdemeanour and punishable accordingly.”

In *Regina v. Roddy*, 41 U. C. R. 291, all the cases bearing upon this question up to the time of that decision were referred to and reviewed. Since that decision other cases have been determined bearing somewhat upon the same question and arising under the words of the Supreme Court of Judicature Act, 36 & 37 Vic., ch. 66, sec. 47 (Imp.), “ No appeal shall lie from any judgment of the said High Court in any criminal cause or matter,” &c., &c.

In *Mellor v. Denham*, 5 Q. B. D. 467, it was held that an information laid for the contravention of a by-law of a school board in neglecting to send a child to school, and for which a penalty of five shillings was imposed under the Act 33 and 34 Vic., ch. 75, was a criminal cause or matter.

In *Regina v. Whitchurch*, 7 Q. B. D. 534, an order made by justices under the Public Health Act of 1875, “ to fill

up the said ash-pit, to abandon the said privy, and to construct a proper and sufficient pail closet, so that the same shall no longer be a nuisance as aforesaid," was held to be a "criminal cause or matter."

In the *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667, an injunction by the Attorney-General to recover penalties against the defendant for acting as a member of the House of Commons without complying with the provisions of the Parliamentary Oaths Act, 1866, was held not to be a criminal cause or matter, and the cases of *Mellor v. Denham* and *Regina v. Whitchurch* are there referred to and distinguished.

See also *Osborne v. Milman*, 17 Q. B. D. 514, reversed in 18 Q. B. D. 471.

In my opinion, therefore, an order should issue, quashing that part of the conviction awarding imprisonment in default of distress, and there should be no costs of this appeal.

WILSON, C. J.—The section of the Weights and Measures Act, 1879, ch. 16, applicable to this case, is sub-sec. 2, added by the 47 Vic. ch. 36, sec. 7 to sec. 41 of the Act of 1879, which declares that if any person wilfully obstructs or impedes any inspector or assistant inspector in the performance of his duty under the Act, \* \* such person, and any person aiding or assisting the offender, shall thereby incur a penalty of \$100. Then sec. 53 of the Act declares that all forfeitures and penalties imposed by the Act shall be recoverable with costs before any civil Court of competent jurisdiction, or before any Justice of the Peace for the district, county, or place in which the offence was committed, if such forfeiture or penalty does not exceed \$50, and before any two such justices or any magistrate having by law the power of two such justices, if it exceed \$50, upon proof by confession or by the oath of one credible witness, and may, if not forthwith paid, be levied by execution of distress and sale of the goods and chattels of the offender by warrant

under the hand and seal of such justice, justices, or magistrate, by whom also any imprisonment to which the offender is liable may be awarded, and to all such cases the 32 & 33 Vic. ch. 31, shall apply, subject to the provisions of this Act.

By the 30th section, a person forging or counterfeiting any stamp, contrary to the Act, for the first offence incurs a penalty of \$40, and for any subsequent offence a penalty of \$100, and is liable to two months' imprisonment.

It is expressly stated in sec. 53 that the penalty may be levied by distress and sale of the goods of the defendant. It does not say anything very plainly of or about imprisonment in case there are no goods. What the section says is that the penalty shall be levied by distress and sale of the goods "by warrant, under the hands and seal of such justice, justices, or magistrate, *by whom also any imprisonment to which the offender is liable may be awarded; and to all such cases the Act 32 & 33 Vic., ch. 31, shall apply, subject to the provisions of this Act.*"

What is the meaning of the latter provision, "by whom also any imprisonment *to which the offender is liable* may be awarded?" &c. Does it apply to such cases only to or for which imprisonment is expressly awarded by the Weights and Measures Act? For there is such a case in the sec. 30 for the second offence of forging or counterfeiting stamps. Or does it apply as well to all cases in which imprisonment may be awarded under the Act of 1869?

If the enactment is applicable only to imprisonment expressly imposed by the Weights and Measures Act; that is, if the words, "by whom any imprisonment *to which the offender is liable* may be awarded," apply only to those offenders who are liable by the express imposition of imprisonment which is specified in that Act, there was no occasion for referring to the Act of 1869. But if it was intended to subject the offenders, under the Weights and Measures Act, to the imprisonment not provided for specifically by that Act, but provided for by the *general*

law relating to summary convictions, then there was a purpose in referring to that Act and the words, "and to all such cases the Act of 1869 shall apply, subject to the provisions of this Act;" that is, sec. 53 of the Weights and Measures Act empowers the convicting justices to levy the penalty, by distress and sale of the goods of the offender, by their warrant; "by whom *also any imprisonment* to which the offender is liable may be awarded, *and to all such cases* the Act of 1869 shall apply, subject to the provisions of this Act;" that is, the justices who issue the distress warrant may *also* award imprisonment to which the offender may be liable under the General Act of 1869; *and to all such cases*, that is, *and for that purpose*, the Act of 1869 shall apply, subject, that is, not contrary, to the provisions of the special Act.

I may say I have no doubt that is the real meaning and effect of sec. 53 of the Weights and Measures Act, but it might have been more plainly worded.

The General Act of 1869 applies to the Weights and Measures Act in all of its enactments and forms.

Under sec. 53, which gives the costs, and the form in the schedule N1, which provides for them, although not mentioned in sec. 57 of the Act, the costs are recoverable; and under sec. 62, which gives the power of imprisonment, and the form N5, imprisonment may be awarded for the term specified, of three months.

I think, however, the imprisonment, as an alternative punishment, should not have been awarded in the conviction against the defendant; for by sec. 62 that is only to be imposed upon the return of no goods; and the Justice of the Peace is to recite that return, (see form N5) and to grant a special warrant for imprisonment of the defendant for the specified time, unless the several sums, and the costs of the distress [and of the commitment and conveying of the party to the gaol, amounting to the further sum of       ] shall be sooner paid, if (sec. 62) the justice thinks fit so to order, the amount thereof being ascertained and stated in such commitment.



The justices had *jurisdiction* to proceed against the defendant by distress and imprisonment, but not, I think, in the form in which they have done so.

This conviction has been affirmed on appeal, and the *certiorari* should not have issued under sec. 70 of the Act of 1869, ch. 31, as amended by 33 Vic. ch. 27. sec. 2, and the 49 Vic. ch. 49, sec. 7, (D.)

By the Act of 1869, ch. 31, sec. 68, the appeal from a conviction is to be tried upon the merits, "notwithstanding any defect of form or otherwise in such conviction; and if the defendant is found guilty, the conviction shall be affirmed, and the Court shall *amend* the same, if necessary; and any conviction so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal." See also sec. 73. I do not refer to the 49 Vic. ch. 49, as the act complained of took place before the passing of that Act.

I am of opinion, as we are not sitting in judgment by way of appeal, we cannot amend the conviction. We are to determine whether it is a proceeding valid in law.

In my opinion we may not have the power to strike out any part of the conviction, that is, to amend it: we can under the enactments before mentioned, and by the 49 Vic. ch. 49, secs. 2, 3, and sub-sections, pass over the defects and insufficiencies.

There is no case in which the Court has ever amended a conviction. The *order* of justices may be avoided in part and stand good for the residue, as in *Jenney v. Brook*, 6 Q. B. 323; *Ex parte Coley*, 15 Jur. 128, 20 L. J. M. C. 168, and several other cases. But that was not contended for, nor done in *Barton v. Bucknill*, 13 Q. B. 393, and *Regina v. Barton*, 13 Q. B. 389, nor in any other case I have seen.

The only difference between an order and a conviction seems to be, that if the statute call the proceeding an order it is an order, and if a conviction it is a conviction: *Rex v. Bissin*, Say. 304; *The King v. Justices of Cheshire*, 5 B. & Ad. 439; *Ex parte Purdy*, 9 C. B. 201, and the



other cases before mentioned. See also *Paley* on Convictions.

It was a strong argument in former times that an order was different from a conviction, because orders were always drawn up in English, whereas convictions were drawn up in Latin: *Rex v. Lloyd*, 2 Str. 996-998.

Lord Holt said, in *Rex v. Lomas*, Comber. 289, he could see no reason for the distinction between them. Nor I believe can any one else. It is satisfactory to know they are one or the other just as the Legislature may happen to call them.

The wrongful exclusion of testimony by the Justice or by the Sessions is not a ground for quashing the conviction, and the Court will not, of course, grant a *mandamus* directing the evidence to be received: *The King v. Justices of Cambridgeshire*, 1 D. & R. 325; *Rex v. Justices of Carnarvon*, 4 B & Al. 86.

I do not think it necessary to say whether this defendant committed a *crime*, or only an act punishable by fine and imprisonment, and it may be with hard labour. That degree and mode of punishment are held to be sufficient to make the act charged a crime. By sec. 53 of the Weights and Measures Act the party might have been proceeded against in any civil Court of competent jurisdiction, as well as before a Justice of the Peace.

The test of an act being a crime or not a crime is probably as good a one as was given by Lord Campbell in *Cattell v. Ireson*, E. B. & E. 91: "I do not rely on the statute calling the act an offence" [which the sec. 53 of our Act does] "but that the statute treats it as an offence." It is not the most satisfactory test, for the inquiry still is, when, in what manner, and how is it known the statute treats it as an offence? It is not necessary to apply that test in this case, for the fact of this being a crime is made the ground upon which the evidence of the defendant was excluded from giving evidence, for he is not entitled to the relief, even although he was wrongly excluded.

I am of opinion the defendant having appealed to the Sessions, and the conviction having been affirmed, the *certiorari* is taken away ; and I am also of opinion he is not entitled to the writ, because the punishment imposed by the conviction is within the jurisdiction of the justices to award ; but they have irregularly directed that it shall follow the insufficiency of the distress, whereas the constable should have made his return of no goods, and the justices should then upon that state of facts have made a warrant of commitment for the imprisonment ; but that shews only an insufficiency in the form of the conviction, which the defendant is not entitled to question at this stage of the case, after the affirmance of the conviction by the Sessions of the Peace upon his appeal.

The motion should be dismissed, with costs.

O'CONNOR, J., concurred with WILSON, C. J.

*Appeal dismissed, with costs.*

---

## [QUEEN'S BENCH DIVISION.]

## STANDARD BANK V. DUNHAM AND PARK.

*Partnership style, of—Name, of individual member—Note made in firm name  
—Dissolution—Liability of firm—Misdirection.*

J. E. Dunham carried on business at Montreal from February, 1886, to 1st September, 1886, under the style of J. E. Dunham & Co. The same J. E. Dunham, with W. W. Park carried on business at Toronto from 1st May, 1886; to 1st August, 1886, under the same style, J. E. Dunham & Co.

By the articles of partnership between Dunham and Park it was agreed that Dunham should not sign the firm name to bills or notes. The dissolution of the partnership between Dunham and Park was not advertised until the 20th August, 1886. Dunham, for purposes of his own, and without the knowledge of Park, upon the 11th of August, 1886, signed a series of notes amounting to \$21,000 with the firm name of J. E. Dunham & Co., and gave them to one Isaacs. The note in question in this action was one of that series, but antedated upon the 30th July.

The plaintiffs who had no knowledge of Park being a member of J. E. Dunham & Co., took this note without notice of any infirmity, and to secure a pre-existing debt which was overdue. The Judge at the trial charged the jury that the plaintiffs had a right to resort to either firm for payment.

*Held*, a misdirection, and that there was no such right of election; that it was for the creditor to prove who his debtor was and not for the defendants to prove that they were not the debtors.

*Held*, also, that if this note had been given before the 1st of August, the Judge at the trial should have left it to the jury to say which firm Dunham intended to bind; but that as the note was not given during the partnership, and as the plaintiffs had no knowledge of the firm, or of Park being a member of it, the question was not material.

*Held*, also, that as the plaintiffs knew nothing of the firm of J. E. Dunham & Co., or the members of it, and had had no dealings with it, the defendant Park was not liable upon the note signed after the 1st of August, when the dissolution actually took place, although before the 20th of August, when publication of the same was made.

As the facts were all before the Court, instead of ordering a new trial, judgment was given for the defendant Park, with costs.

ACTION upon a promissory note, made by the defendants, as alleged, dated 30th July, 1886, for the sum of \$1,270.50, payable to the order of L. Isaacs & Co. three months after date, endorsed by the payees to the plaintiffs.

There was judgment by default against Dunham.

Park defended the action, denying, among other defences, the making of the note.

The action was tried at the last Spring Assizes at Brantford before Cameron, C. J., and a jury.

The evidence, which was very long, may be thus stated :

Dunham began business in Montreal about February or March, 1886, as manufacturer and importer of aniline dyes, &c., under the name of J. E. Dunham & Co., and he registered in Montreal the name and style in which he carried on business, he being the sole partner, and he continued it until about September of the same year, when he gave it up ; and he registered a certificate of his dissolution. Alexander Allan took on the business from the 1st of September, as sole manager, under the name of Dunham & Co.

Dunham and Park in Toronto entered into partnership on the 1st of May, 1886, in the same kind of business under the name of J. E. Dunham & Co., the same name that Dunham used in the Montreal business, and it appeared that Park did not know of that Montreal business. The articles of partnership provided that Dunham should not sign notes, checks, or indorse, or the like. Park was to do the whole of the financial business. Dunham had the right to end the partnership at any time before 1st August, 1886, by a three days' notice in writing, and Park had the right to end it at any time by giving a three days' notice. Dunham gave a three days' notice before the 1st August and so ended the partnership. That partnership was not registered. The business was continued up to 20th August, as it had been before the 1st August, as J. E. Dunham & Co., it having been intended that Dunham should still carry on the business, and he was to buy out the interest of Park in the business.

Dunham tried to make an arrangement with Mr. Allan to enter into the partnership, for which Allan was to pay \$5,000, and with that sum Dunham intended to pay off Park. That purpose fell through.

Then Dunham was introduced to Mr. Isaacs by Allan, and dealings went on between Dunham and Isaacs about money being raised to pay Park off ; but much more was done than was sufficient for that purpose.

It appeared that on 11th of August, which was after the Toronto firm of J. E. Dunham & Co. had been dissolved

Dunham signed several promissory notes payable to Isaacs, or order, amounting in all to about \$20,000 or \$21,000—the one now sued upon being one of them—and gave them to Isaacs; and Isaacs gave to Dunham his, Isaacs's, promissory notes to about one-half the amount of the notes which Dunham had given to Isaacs, and Isaacs was to pay to Dunham out of the proceeds of Dunham's notes—\$10,000. That would leave the balance of Dunham's notes about equal to the amount of Isaacs' notes; but Dunham would be held for the payment of the notes upon which he was to get the \$10,000, as well as on the balance of his notes if they were discounted. It was not explained what Isaacs was to do with the notes which he held, beyond those which were to be used to raise the \$10,000. It would seem that Isaacs was to discount them for his own purposes, and Dunham was to discount Isaacs's notes in like manner for his own purposes. Dunham's notes, though made on the 11th of August, after the partnership with Park had ended, were dated on the 30th of July, two days before the partnership closed.

Isaacs said he would take Dunham's notes to Brantford, and discount them there; and he went to Brantford and arrived there on the evening of the 11th of August, the same day he got the notes in Toronto. The notes were signed by Dunham in the name of "J. E. Dunham & Co."

That same night, upon reaching Brantford, Isaacs called at Mr. Gardiner's house, and he and Mr. Gardiner went together to see Mr. Wickham, the manager of the Standard Bank there. They wanted him to discount the note sued upon. Isaacs represented the note as the note of the firm composed of Dunham & Park. The next day Isaacs and Mr. Gardiner called again at the bank, and wanted the note discounted. Mr. Wickham took it and gave Gardiner's account with the bank credit for it, which nearly balanced the amount which was overdrawn upon that account. Isaacs left some collaterals for bills which the Bank had discounted for Mr. Gardiner, but he did not discount them. These bills were drafts of Gardiner upon Isaacs which



about the end of July were being returned. Gardiner owed then about \$3,000. Isaacs wanted Mr. Wickham to discount \$8,000 or \$9,000 of these notes. Wickham refused, but he took about \$4,000 of them as collateral to secure Gardiner's account. Mr. Wickham went to Toronto on the evening of the 12th of August to see the inspector of the bank about the notes which Isaacs wanted to get discounted. The inspector, Mr. Reid, saw Mr. Park about the notes. Park said the partnership was dissolved. Reid did not shew him the notes he had. Park said no paper of the firm was outstanding, but an acceptance, and he gave Mr. Reid, who asked it, his signature of the firm name of "J. E. Dunham & Co." Mr. Reid wanted to compare it with the signature to the notes. From what Park told Reid the latter wrote the letter to Mr. Wickham the notes were not worth the paper they were written on. Mr. Cowan, the president of the bank, told Mr. Park he did not think there would be any trouble about the notes—the bank held the notes only as collateral security.

The notes which Isaacs held, besides those he gave to the bank, were afterwards got from him by criminal proceedings in Montreal.

If Isaacs had discounted the notes he got from Dunham he would have had, after giving Dunham the \$10,000 he promised him, about the like sum for other purposes in his hands.

Part of that contemplated purpose, it appeared, was to pay Mr. Gardiner about \$4,000 which he owed to him for goods he, Isaacs, had bought from him. Gardiner owed the Standard Bank that amount on Isaacs' transaction, and, as the bank was pressing, Gardiner was pressing Isaacs, and Isaacs went to Brantford to carry out his projects, but he did not succeed.

As to the other matters connected with this action, it was said that although the partnership of J. E. Dunham & Co., of Toronto, was in no way connected in business transactions with the firm of like name in Montreal, in which Dunham alone was interested, that Park must have

known or must be taken to have known there was a firm of that name doing business in Montreal, although he said he did not know it in fact, because on the bill-heads of the invoices used in the Toronto business was printed :

“ Montreal and Toronto, 37 Wellington St.  
Works—Front St. East.”

The bill continued :

“ Toronto, , 1886.

“ Bought of J. E. Dunham & Co.”

And because in the heading of the letter of notice of dissolution, dated 24th July, 1886, given by Dunham to Park, it is printed :

“ J. E. DUNHAM & Co.,  
“ Importers and Manufacturers,  
“ Montreal and Toronto.”

It was also said that Dunham was intoxicated or incapable of knowing what he was about when he gave these notes.

It was also said, although the Toronto firm was dissolved on the 1st of August, and the note in question was negotiated on the 12th of the month, that Park is still liable because no notice of the dissolution was given until after the transfer of the note.

It was also said the notes were given without value or consideration by Dunham to Isaacs, and by Isaacs to Gardiner or to the bank on Gardiner's account, for the bank did nothing with the note but give credit to Gardiner on his account for the amount of the note.

Lastly it was said that Dunham did not in fact sign the name of J. E. Dunham & Co. as representing the Toronto business in which Park had been a member, but as representing himself, for he did not think he could affect Park by that signature, as the partnership had in fact been dissolved, and he had a right to use that name after the dissolution.

The learned Chief Justice directed the jury that although the partnership as between Dunham and Park terminated

on the 1st of August, yet the business went on after that date, as the business had not been wound up, and Park expected Dunham would buy him out, and no notice was given to the world of the partnership having been determined; and Mr. Wickham, the bank manager at Brantford, was told when he took the note that the firm of J. E. Dunham & Co. was composed of Dunham and Park. He continued: "Now, if there was no notice determining the partnership, the public not being advised that the partnership had come to an end, any person taking the note signed in the way in which that firm signs its name would have a right to look to all the parties composing that firm to make their contract good. \* \* The defendant has set up also that there was a partnership of the like name in Montreal carried on by Dunham alone \* \* The plaintiffs say that is a matter of indifference to them whether it was a separate business or not, because they say that the law makes such partnership liable where there is a member of it using the name of the firm in a contract, that the person contracted has a right to resort to either firm that he pleases if the name will answer either firm; and I think the law as laid down by Mr. Lash in that respect is correct, so that if J. E. Dunham & Co., of Montreal, on that undertaking, and the person who received it, the endorsee of the bill, as the bank was in this case, took that without knowledge as to which firm it applied, and J. E. Dunham was a member of both firms, then the bank had a right to resort to the firm in Toronto or the firm in Montreal, and the partners must settle their rights among themselves \* \* It is by no means clear that this business could not be carried on by Mr. Park in Montreal, nor that he was not interested in the business in Montreal as well as the business in Toronto, for the articles provide that the business is to be carried on at Toronto, or at such other place or places as the partners shall from time to time mutually agree upon. There is no evidence of any specific agreement between the parties that the business was to be carried on in both places, but there is a species of evidence furnished in cer-

tain bills delivered by their Toronto partnership during its continuance—(reading the bill heads of the two accounts put in, of the 9th of June and 30th of July, and the letter of notice of dissolution, dated the 25th of July, sent from Montreal by Dunham to Park, at Toronto), \* \* which is an intimation to him that business is being carried on in Toronto and in Montreal. He was also the financial manager of the Toronto business, and these are the circumstances which are brought forward for the purpose of shewing you that as a fact there is reason to assume that this was really the transaction of Mr. Park.

The weight of evidence is that Dunham was endeavoring to raise money on these notes without the knowledge of Park, and probably not for the business at all; but it may have been to buy Park out. It is said an arrangement was made between Dunham and Isaacs that \$20,000 should be raised. Well, I look at the articles again. Dunham's capital, his stock of goods, and debts due him, were \$2,000. Park put in no capital, but he was to endorse for Dunham to the amount of \$6,000 during the first three months, and \$10,000 for the next three months, if partnership continued \* \* If notice had been given after dissolution, when the partnership ended, the agency of one for the other would have ceased; and when J. E. Dunham signed this note it would not have been the note of the firm at all, but the note of J. E. Dunham only; and it is only by reason of Mr. Park not giving notice, publishing to the world that the partnership had ceased, that it would be held to be his note."

The learned Chief Justice then commented upon the defence of Dunham being intoxicated when he signed the notes, and he said: "If these plaintiffs took the note *bonâ fide*, without notice of any fraud or imperfection, and for valuable consideration, they are entitled to receive though Dunham may have been drunk \* \* On the evidence are you satisfied Mr. Wickham had any notice that there was fraud in this transaction, or that Dunham was intoxicated when he made the notes and did



not know what he was doing? With regard to consideration, I am bound to tell you that a man who takes a note on account of an existing debt due to him gives consideration for it just the same as if he handed over so much money, though the effect of taking the note may not be to discharge the original debt. \* \* The bank having pressed Mr. Gardiner for payment he made an arrangement with Mr. Heyd, who advanced the moneys for Gardiner, and the bank was to hold the securities they had for Heyd. \* \* I tell you, unless you are satisfied the bank had notice of the drunkenness incapacitating from making the note if he were drunk, or of the fraud in Isaacs's obtaining the notes from Dunham, if there was fraud in it, or of the fraud that Dunham was practising upon Park, then I think there is no defence in law."

The counsel for the defendant took exception to the ruling of the learned Chief Justice that the bank could resort to either firm of J. E. Dunham & Co. for a note signed in that name, although it was the note in fact of the firm which was sued. The Chief Justice was then asked to put a question to the jury, "Which partnership was intended to be bound by the note, the partnership in which Dunham was sole member or the firm in which Park was a member"? He said: "The evidence is all one way on that." Mr. Paterson—"That is what I say, and I submit the law will apply." Mr. Lash—"The Court may fix it without any new trial." The Chief Justice—"I fancy you will have the law settled without it."

The defendants' counsel objected that the jury should have been told the note was void if intoxication was proved, and that the mere taking and crediting this note to Gardiner's account was not a consideration sufficient in law to make the bank holders for value.

The jury gave a verdict for the plaintiff and damages, \$1303.35, the jury finding that Dunham and Park made the note, and that the alleged time in the statement of defence was not proved.

The defendants served notice of motion to the effect stated in the order *nisi*.



In Easter Term *J. K. Kerr*, Q. C., for the defendant, obtained an order *nisi* to set aside the verdict and judgment, and to enter judgment for the defendant Park, on the following grounds: (1) It was established that Dunham, in making the note sued upon, and the other notes made at the same time, intended to bind the Montreal firm of J. E. Dunham & Co., in which he had no partner, and did not intend to bind the firm in which Park was a member; and that Park had no knowledge of the making of the notes, nor did he, or the firm of which he was a member, receive any benefit therefrom, or any consideration therefor. (2) Or why the verdict or finding of the jury, and the said judgment, should not be set aside and a new trial had upon the grounds above stated. (3) And on the ground of misdirection on the part of the learned Chief Justice in directing the jury that the plaintiffs did not dispute by any positive evidence that the business in Montreal, carried on by J. E. Dunham alone, under the name of J. E. Dunham & Co., was not a separate business, the language of the learned Chief Justice being: "They say it is a matter of indifference to them whether it was a separate business or not, because they say the law makes each partner, whether there is a member of it using the name of the firm in a contract, that the person contracted with has a right to resort to either firm that he pleases, if the name will answer either firm, and I think the law as so laid down is correct. So that if Mr. J. E. Dunham used the name of the firm, J. E. Dunham & Co., of Montreal on that undertaking, and the person who received it, the endorsee of the bill, as the bank was in this case, without knowledge as to which firm it applied to at all, then the bank had a right to resort to the firm in Toronto, or the firm in Montreal, and the partners must settle their rights amongst themselves." (4) And for misdirection in directing the jury that the plaintiffs, when they received the note sued on, were assured that the persons who composed that firm were J. E. Dunham & Park. (5) And for misdirection in directing the jury that one

who takes a note on account of an existing debt due to him, gives consideration for it just the same as if he handed over so much money, though the fact of taking the risk may not be absolutely to discharge the original obligation. (6) And misdirection in directing the jury that if in this they were satisfied that the bank had notice of Dunham's drunkenness, incapacitating him from making the note, or from fraud of Isaac in obtaining this note from Dunham, or of the fraud that Dunham was practising on his partner Park, that is no defence in law to this matter. (7) On the ground of non-direction in not directing the jury that if the note sued on was given by Dunham intending to bind the firm, of which he was alone a member, the defendant Park and the firm of which he was a member would not be liable, or in not leaving it to the jury to find which firm Dunham intended to bind. (8) In not directing the jury that if they found the plaintiffs did not act in any way so as to postpone their rights or extend the time to Gardner on account of getting the note, or in some other way gave consideration, that was no consideration in law entitling them to sue the defendant Park. (9) In not directing the jury that if Dunham was drunk when the note was made, it was totally void. (10) On the ground that after the receipt of the note by the plaintiffs, they received notice that neither Park nor the firm of which he was a member had made the note, and of the fraud upon him in the transactions; and that thereafter they, the plaintiffs, were paid the amount by Boyd, at the request of Gardner, but with notice of the facts, and were therefore not entitled to recover thereon for Boyd and Gardner. (11) On the ground that the partnership between Dunham and Park had been dissolved prior to the making of the notes, and Dunham had no authority to bind Park, and did not intend to do so. (12) On the ground of the wrongful admission of the evidence that the plaintiffs were assured by Isaacs that Parke was a member of the firm of J. E. Dunham & Co. (13) On the ground of the wrongful rejection of the evidence

of Guerin, tendered at the trial, to establish that Isaacs held the notes, including the one sued on, without consideration; that he had obtained such notes in fraud of the defendant Park; that upon the fraud being charged against Isaacs, and the note demanded back, the fraud was admitted and the note returned except the one sued on. (14) And on the evidence and weight of evidence.

*J. K. Kerr*, Q. C., *John A. Paterson* with him, supported the motion.

The authorities cited were the following: *Lindley* on Partnership, 4th Am. ed., 34 *et seq.*; *Hall v. West*, Id. 343, 344; Id. 415, shewing plaintiffs not entitled to notice of dissolution of partnership, as they had not known before taking the note of there being such a partnership as J. E. Dunham & Co., and had never known Park to be a member of that partnership. They also cited *Swan v. Steele*, 7 East. 210; *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109; *Re Adanson's Fibre Co.*, L. R. 9 Ch. 635; *Baker v. Charlton*, Peake's N. P. C. 111; *Chalmers*, Bills of Exchange, 2nd ed. 64. *Federal Bank v. Northwood*, 7 O.R. 389; *Bigelow* on Bills and Notes, 2nd ed. 497; *Daniel* on Negotiable Instruments 214; *Cross v. Currie*, 43 U. C. R. 599; *Gore v. Gibson*, 13 M. & W. 623; *Re James*, 9 P. R. 88; *Siner v. Great Western R. W. Co.*, L. R. 4 Ex. 117; *Matthews v. Baxter*, L. R. 8 Ex. 132; *Foster v. McKinnon*, L. R. 4 C. P. 704.

*Lash*, Q. C., *Holman* with him, contra, cited *Roscoe's* N. P. 15 ed. 501; *Carter v. Whalley*, 1 B. & Ad. 11; *Farrar v. Deflinne*, 1 C. & K. 580; *Byles* on Bills, 14 ed. 146, 151, 155; *Evans v. Morley*, 21 U. C. R. 547; *Gooderham v. Hutchison*, 5 C. P. 241; *Swift v. Tyson*, 16 Peters 1; *Kirk v. Blurton*, 9 M. & W. 284.

*Kerr*, Q. C., in reply, cited, *Lindley* on Partnership, 403-5-6; *Carter v. Whalley*, 1 B. & Ad. 12.

June 28, 1887. WILSON, C. J.—The following matters are not, I think, in dispute: That Dunham carried on business alone in Montreal in the name of "J. E. Dunham & Co.," for a short time before he formed the partnership with Park, and he continued that Montreal business until about a month after the partnership with Park was closed: that Dunham and Park formed a partnership in Toronto, on the 1st of May, 1886, under the name of "J. E. Dunham & Co.," which was to last for one year, terminable by Dunham giving to Park a notice of his desire to dissolve the partnership, of at least three days before the 1st of August, or by Park giving to Dunham a notice to the like effect, of at least three days, at any time during the year.

That by the articles of their partnership Park was to do the financial business, and Dunham was not to make or sign notes, checks, &c., nor to draw or accept bills, nor to endorse such instruments, or the like.

That Park had no interest in the Montreal business, nor had the one house any dealings with the other house.

That the business carried on in Montreal by Dunham was of the like nature as the business which was carried on by Dunham and Park in Toronto.

That the articles of partnership between Dunham and Park were not registered.

That on the 24th of July, Dunham, in Montreal, wrote to Park, in Toronto, giving him notice of the dissolution of the partnership on the 1st August; and on that day the partnership did cease; but no notice of the dissolution was given till about the 20th of August.

That Dunham desired to carry on the business in Toronto, after the 1st of August, in the same name of J. E. Dunham & Co., either alone or by some different arrangement than with Park as a partner; and he preferred to buy out Park's interest in the business.

That the Toronto business was going on after the 1st of August, and up to about the 20th of the month, just as it had been carried on before the partnership was termi-



nated, in the name of J. E. Dunham & Co., because, as I understand it, Dunham intended to continue, as before stated, the business he had established; but I do not understand Park had any interest in that business as a partner after the 1st of August.

That on the 11th of August, Dunham, at Toronto, made notes in the name of J. E. Dunham & Co., in different sums amounting in all to about \$21,000, payable to L. Isaacs or or order, without notice to, and without the knowledge of Park,—the notes being ante-dated to the 30th of July,—before the partnership had ended.

That at the same time, 11th of August, Isaacs took the notes so made by Dunham to Brantford.

That Isaacs and Mrs. Gardner, the wife of Henry B. Gardner, went to Mr. Wickham, the manager of the plaintiffs' bank at Brantford, Isaacs having the said notes with him, and wanted Mr. Wickham to discount some of these notes; and they called again upon Mr. Wickham for the like purpose.

That on the 12th of August Mr. Wickham agreed to take the note now sued upon from Isaacs and discount it, which was done by passing it through the books to the credit of Gardner's account, which was overdrawn then to an amount about equal to the note which was given to the bank.

Isaacs at the same time left with the bank some others of these notes, which Mr. Wickman took, as he said, as collaterals for the amount of Gardner's account, somewhat about \$4,000, which it appeared Gardner owed to the bank chiefly on account of returned acceptances of Isaacs.

That at the time the note in question and the others as well were left with Mr. Wickham he had no knowledge of Park ever having been a partner with Dunham, nor did he know who the members of the firm of J. E. Dunham & Co. were or had been, nor, so far as I remember, that there ever had been such a firm, except that Isaacs then told him there was such a firm, and that Dunham composed it.



That there was no other value or consideration for the taking of the notes by the bank than the crediting or discounting, as it is called, of the note now sued upon and the taking of the others as collaterals or security for the amount of Gardner's account, and that opposite the credit of the note sued upon in the bank books was written the word *hold*, to shew that no advance or payment was to be made upon it.

That on the 13th of August Mr. Reid, the bank inspector, applied to Mr. Park in some general way about notes of the firm, and Mr. Park told him the firm had nothing but one acceptance outstanding, and that the partnership had been dissolved; and the same day Mr. Reid wrote to Mr. Wickham "he did not think the notes were worth the paper they are written on."

That the bank afterwards received from Mr. Heyd about \$3,400 on account of Mr. Gardner, which was credited to Gardner, and the note now sued upon is proceeded upon by the bank for Mr. Heyd's benefit.

It is not admitted by the bank that Dunham was intoxicated, and did not understand what he was doing when he made the notes to Isaacs, and the jury found against that defence, and found the issue rightly, as we think. Nor is it admitted by the bank that Dunham did not intend to bind the partnership of J. E. Dunham & Co. with Park as a partner. The jury may have found he did. I am not satisfied they did so find. The learned Chief Justice directed the jury that as there was no notice given of the dissolution Park continued liable, and that may have induced them to find against Park. But on the direct point whether Dunham intended to bind Park by the notes, the learned Chief Justice was of opinion, as I infer, that there was no use in putting such a question, "for the evidence was all one way," that is, that Dunham did not intend to bind the Toronto firm, or the Toronto firm with Park as a partner. And the defendants' counsel put that construction upon the language of the Chief Justice. Then the plaintiff's counsel said "the Court may fix it without

any new trial," and the Chief Justice said, "I fancy you will have the law settled without it."

The question then was not put to the jury, either because it was a useless question for the fact was in favour of the defendant, or at any rate that the Court could give the benefit of the fact to him if the law, assuming the fact to be in his favour, entitled him to a judgment upon such fact.

I shall now dispose of the grounds taken in the order *nisi* to the verdict and judgment for the plaintiffs.

The first and second grounds as to Dunham, not intending to bind the Toronto firm, "with Park as a member of it," I add, for that is what was meant: so far, from what I have said we are to decide how the fact is from the evidence. I say Dunham did not intend to bind the Toronto firm with Park as a member of it, although he may have intended to represent a Toronto business of that name, as he intended to carry it on in Toronto, and, as I understand, was carrying it on upon that 11th day of August as a going business of his own. But the intention is not material from the other parts of the case. Certainly Park got no benefit from these notes, and was not intended to receive any. Dunham's act was in direct contradiction of the articles, and this is also a circumstance shewing his intent was not to bind Park. But the dating of the notes on a day within the term of the partnership points the other way if he noticed the date, and it may be he did not, as he says he did not. The notes were a scheme of Isaacs, and it is likely he managed the whole matter. Dunham said he did not think he could bind Park, as the partnership was not in existence. The way this part of the case was dealt with at the trial relieves us from all difficulty in saying Dunham did not, in fact, so far as it is material, intend to bind Park by the making of these notes.

The third objection, that a person receiving the note of a firm in the name of J. E. Dunham & Co., there being two firms of the like name, may, if he do not know by which firm the note was made, proceed against either firm

at his election, must now be considered. It is not clearly stated in the notes, although the learned Chief Justice must have said that was the law if there was a member in each of the firms who was a partner in both, because that was the state of the facts in the case of *Baker v. Charlton*, Peake's N. P. C. 111, which was cited to the learned Judge, and upon which he acted.

I think that direction to the jury is not a correct statement of the law.

In *Chalmers on Bills of Exchange*, 64, 2nd ed, it is said: "It was formerly thought that where two distinct firms, having one or more partners in common, carried on business under the same name, each firm was liable on the acceptances of the other to the holder for value without notice: *Lindley on Part.* 3rd ed., 387; but since the case of *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109 C. A., it seems clear that hard rule is no longer law."

The case just mentioned in 5 C. P. D. 109, was not a note made in what appeared to be a partnership name as A. & B. or A. & Co., but in the name of a single person. The facts were: Beatson carried on business as a chemical manufacturer at Rotherham. Mycock, the other defendant, then went into partnership with Beatson in that business; the name of the firm was to be William Beatson. The plaintiff never heard of the existence of any partnership until long after the discount of the bills sued upon, and knew nothing of Mycock till then. After the partnership no change was made in Beatson's account in the bank; it was kept in his own name. The firm had no separate account. One of the bills in question was drawn by Josiah Carr & Son upon Beatson at the address of the chemical works, Rotherham, and the jury found upon that fact that Beatson's acceptance of it must be held to denote it was the acceptance of the firm. That bill was payable to the drawers and endorsed by them.

The other bill was drawn by one Kelly upon one Wilson, and endorsed by Kelly, William Beatson and Josiah Carr & Son.

The Court below, 4 C. P. D., at p. 206, held the address of the one bill to the place of business was no evidence that it was a business transaction.

The bills were in fact accommodation bills for Beatson's own benefit. The only evidence given as to the intention to bind Mycock was against such intention.

The Court below held it was not sufficient to prove the name of the partnership was put to the bill; in order to make the partnership liable the holder must further prove the signature was put to it by the authority of and for the purposes of the firm.

In the Court of Appeal, p. 114, Thesiger, L. J., who gave the judgment of the Court, said: "It is contended for the plaintiff either, first, that where as in this case a signature is common to an individual, and to a firm of which the individual is a member, it is open to the *bonâ fide* holder for value, without notice, whose paper it is, of a bill with such signature to it to sue either the individual or the firm \* \* As regards the first of these two contentions we think it is not a well founded one \* \* While, therefore there is really no authoritative sanction for this contention and there is abundant authority against it in the numerous cases, in the English and American Courts, where the liability of partners upon a bill signed in a name common to the firm and an individual member of it has come under consideration and has been discussed, not upon the footing of any right of election on the part of the holder of the bill, but upon the particular circumstances of each case and the presumptions applicable to them. Apart too, from authority, it appears to us manifestly contrary to the true principles of law, that the holder of a bill bearing upon it a name which *primâ facie* indicates an individual, and would naturally lead to credit being given to the individual alone, should, upon discovery and proof that there is a firm of which the individual is a member carrying on business under his name, have the right of going against the firm although at the same time that the proof is given, it is proved also that the bill was signed by the individual for



himself and not for his firm, and for considerations entirely unconnected with any partnership purposes."

Here it is clear these notes were not for partnership purposes—they were purely the accommodation notes of Dunham and of Isaacs.

It was stated also by the Lord Justice, "that the presumption in favor of the plaintiffs, arising from the fact that Beatson carried on no business separate from that of the partnership, sinks into comparative insignificance by the side of the additional facts which are proved in this case": p. 125. He also said: "The English authorities appear to support the view that where a name is common to a firm, and to an individual member of such firm, and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn, accepted, or indorsed in the common name, is drawn, accepted, or indorsed for the partnership, and for which the partnership is liable, and that it lies upon the defendants, in an action against the partners upon such bill, to get rid of the *prima facie* case made against them": p. 121.

What then are the *additional facts* which were proved, against which the presumption in favour of the plaintiffs sinks into comparative insignificance, as the Lord Justice said:

1. "It was clear the bills, if signed by Beatson for the partnership, were signed by him without the authority, and in fraud of his partners, and in respect of which no action would have lain against Mycock, if they had remained in the hands of Josiah Carr & Son, who took them with notice.

2. "The bills, as between Beatson and Mycock, were not treated as having been signed by Beatson on partnership account.

3. "The accommodation transactions of Beatson increased rather than diminished the capital of the firm; and

4. "Beatson, called by the plaintiffs, disproved the fact that he signed for the partnership; that he did not think



he was making Mycock liable for his accommodation transactions, which were private matters": p. 125.

I look upon this as a decision applicable to this case, and in favour of the defendant Park.

It seems contrary to the opinion which one has formed of what the principles of law are, that a partnership of A, B and C signing a note in that form, can bind a partnership composed of A, B, C, D, & E, which latter partnership carries on business by the like name as the other partnership of A, B, & C; and that the holder of a note made by the first firm can merely, because he does not know anything of the two firms, sue either the members of the first firm or the members of the second firm at his election. The two firms are just as distinct bodies as two individuals of the same name. The one firm may deal in hardware, the other may be builders or grocers. The one that made the note may be a firm of no means, the one that did not make it may be a firm of great wealth, and if the holder of the note has the option to choose who his debtors shall be, although he have no direct dealings with either of them, and knew or knows nothing about them, the chances are he will prefer to go against the wealthy firm rather than the poorer one, and the result will be that D & E will have to pay not only all their partnership debts but the debts of the other partnership as well.

That cannot be the law. There can be no such right of election, and I must think from the American cases, and the doubtful manner in which the contrary opinion is expressed in the Court of Appeal, that it is for the creditor to prove who his debtors are, and not for the defendants to prove, unless a *primâ facie* cause is first made against them, that they are not the debtors.

The 4th ground of objection is of no moment.

The 5th ground, that a pre-existing debt is a valuable consideration for the taking of a note, as in this case, would seem to be a valid direction: *Bigelow's Bills & Notes*, 2nd ed., p. 498; *Poirier v. Morris*, 2 E. & B. 89; *Percival v. Frampton*, 2 Cr. M. & R. 180.

The 6th ground, as to the alleged drunkenness, is of no consequence, as there was no such case made. A contract made at such a time is not void, but voidable. It may be ratified : *Matthews v. Baxter*, L. R. 8 Ex. 132.

The 7th ground may be maintained. The learned Chief Justice should have left it to the jury to say which firm Dunham intended to bind, assuming for that purpose the note was given during the partnership, but as it was not given during the partnership, and as the bank had no knowledge of the firm, or of Park being a member of it, the question was of no consequence.

The 8th ground is covered by the 5th ground.

The 9th ground is covered by the 6th ground, and is not sustainable.

The 10th ground is of no consequence.

The 11th and 12th grounds, as to the dissolution of the firm between Park and Dunham before the bank received the note, is a valid objection, and the facts shewed the bank knew nothing of that firm or of the members, and had carried on no dealings with it during its continuance ; and the statement by Isaacs to Mr. Wickham that the partnership was continuing, and that Park was a member of it, was a mere falsehood, and of no effect, as the partnership had then terminated in fact.

The 13th ground, as to the rejection of Guerin's evidence is of no consequence ; and the last ground is sustainable, for the verdict and judgment are contrary to law and evidence.

I am of opinion, for the reasons given, the verdict and judgment for the plaintiffs must be set aside, and as we have all the facts, the same must be entered for the defendant Park, with costs.

ARMOUR and O'CONNOR, JJ., concurred.

*Judgment for defendant Park, with costs.*

## [QUEEN'S BENCH DIVISION.]

## MACGREGOR ET UX. V. DEFOE ET AL.

*Illegal distress for rent—Action for overholding tenant—  
Removal of goods.*

The plaintiff having remained in possession and paid rent after the expiry of his term the defendants' levied a distress upon plaintiffs goods in the premises, situate six miles from Toronto, for two months arrears of rent and removed the goods to Toronto to impound and sell. The plaintiff brought an action of trespass, claiming that he was not defendants' tenant.

*Held.*—1. That the relationship of landlord and tenant existed at the time of the distress. 2. That the removal to Toronto, unless unnecessary and unreasonable, or malicious, was not a good ground of action.

## STATEMENT OF CLAIM :

1. THAT the plaintiffs were on 19th March, 1886, in possession of the lands in question at the time of the trespass complained of.

2. That at the said time the defendants unlawfully, with force and violence, wilfully and maliciously entered upon the said lands, and committed divers trespasses thereon by trampling over the same; and the defendants took the furniture and other property of the plaintiffs from the house and premises, and carried the same away.

3. That plaintiffs had a quantity of valuable furniture and books, in all amounting to the sum of about \$1,000, in and upon the land and premises; and the defendants, with force and violence, entered into the house and premises, and broke, damaged, and injured the said furniture and

books, by piling them upon divers wagons and conveyances, and carrying them away a distance of about six miles, and exposing them for about twelve hours to the rain, by which they became wholly injured and destroyed.

3a. That defendants, on or about 19th March, 1886, under the assumption of a lawful distress for certain arrears of rent being due, entered on the premises and wrongfully seized and carried away certain of the plaintiffs' goods, whereby the same were injured, and the plaintiffs were injured in their credit and business.

3b. That the husband was a tenant of the defendants, Tolfree and Taylor, which he denied; and if the said defendants were entitled to issue a distress against him, the distress was irregular and illegal; and the said defendants were guilty of the trespass alleged, in that the defendants Gegg, James Scott, Edward Scott, and J. Sheppard, their bailiffs and agents, unlawfully removed the goods seized, and referred to aforesaid, about six miles from the place of seizure, and without any notice to the plaintiffs, or either of them, of where the same had been removed; and after a good and lawful tender of the sum of \$40 claimed to be due for rent, and after the goods were impounded, which said sum of \$40 was largely in excess of the amount due for rent, or for costs of seizure by the said John McGregor, or to the said defendants, or either of them.

3c. Setting out a distress of more goods than sufficient to satisfy rent and charges.

4. The defendants removed and carried away from the lands a quantity of the said furniture, several volumes of valuable books, and an enclosed combination washstand, and detained the same, and converted the same to their own use.

5. The plaintiff was compelled to follow the goods taken for about six miles, and lost time and expenses in recovering the said goods, and was compelled to pay upwards of \$50 in and about the recovery.

6. The plaintiffs claimed \$1,500 damages.



## STATEMENT OF DEFENCE :

1. The defendants Defoe, Tolfree, Taylor, and Williams, denied paragraphs 2, 3, 4 and 5 of the statement of claim.

2. The defendants Taylor and Tolfree were the owners of the premises described in the statement of claim, and as such owners were entitled to levy a distress for \$40 rent due to them on or about the 15th March, 1886, by the plaintiff John McGregor, who was the tenant. The said defendants issued a distress warrant on or about 17th March, 1886, for the sum of \$40, and placed the same in Gegg's hands for execution.

3. The alleged trespasses, removals and conversions took place under and in the proper execution of the same, the defendants Tolfree and Taylor claiming from John McGregor the sum of \$40 for two months rent of said premises from 15th March, 1886, to 15th May, 1886, at \$20 a month.

4. The defendant Gegg, James Scott, Edward Scott, and J. Sheppard pleaded "not guilty" by Statute 11 Geo. II. ch. 19, sec. 21, Public Act.

## REPLY :

1. Plaintiffs denied the allegations of the statement of defence of Defoe, Tolfree, Taylor and Williams, as well as the statement of defence of the other four defendants.

2. In reply to the counter-claim of the defendants Tolfree and Taylor, the plaintiff John McGregor denied any tenancy to them and any indebtedness by him for rent for the period mentioned, and said the defendants accepted the key of said premises and entered into occupation of the same by their agents on 13th April, 1886, and retained possession of same, by which said McGregor was relieved from any liability to them from that date.

## ISSUE.

The action was tried at the last Spring Assizes at Toronto, before Armour, J., who dispensed with the jury between the parties.



The learned Judge found all matters relating to the alleged trespass and distress against the plaintiffs, excepting as to a washstand, the property of Mrs. McGregor, which he found to have been taken by defendants and not returned upon payment of the rent and charges, valued at \$12, which sum he allowed to her, with Division Court costs, subject to set off as provided by the R. S. O. ch. 50, sec. 347, sub-sec. 3. And he found the counter-claim of defendants Tolfree and Taylor, the landlords of the demised premises, for \$20, for the month's rent from 15th March to 15th April, 1886, in favour of these defendants against Mr. McGregor, the tenant, and he dismissed the residue of the action, with costs against the plaintiffs.

The plaintiffs moved against the findings and the judgment of the learned Judge.

In Easter Term *G. T. Blackstock* for the plaintiffs supported the motion. He referred to *Smith's L. & T.*, last ed., 381 to 383; *Laxton v. Rosenberg*, 11 O. R. 199; *Tayleur v. Wildin*, L. R. 3 Ex. 303; *Alford v. Vickery*, 1 Car. & M. 280; *Gilbert v. Doyle*, 24 C. P. 60; *Doe d. Cheny v. Batten*, Cowp. 243; *Bennett v. Beyes*, 5 H. & N. 391.

[ARMOUR, J., referred to *Whimsell v. Giffard*, 3 O. R. 1.]  
*J. E. Robertson* shewed cause. He referred to *Hilliard v. Gemmell*, 10 O. R. 504; *Vincent v. Godson*, 24 L. J. Ch. 121.

*Blackstock*, in reply, cited *Vertue v. Beasley*, 1 M. & Rob. 21; *Jenner v. Clegg*, 1 M. & Rob. 213; *Williams v. Stiven*, 9 Q. B. 14; *Woodf. L. & T.*, 13th ed. 124.

June 28th, 1887. WILSON, C. J.—The evidence leads me to the conclusion there was a tenancy for six months agreed upon between Mr. Defoe, the agent of the owners of the land, Tolfree and Taylor, commencing on the 15th of May, 1885, at the rate \$20 per month, payable monthly.

There was some disagreement between Mr. McGregor and Mr. Defoe as to the time when McGregor actually got the possession. McGregor said not till about the beginning

of June, and he claimed that even then he did not get full possession, for one Williams, who had been in possession before the 15th of May, had not left the entire premises; and as he alleged, Defoe had not made the improvements he had engaged to make, so that the term should count only from the 15th of June, and of course, as he contended, it ended on the 15th of December. Mr. Defoe said Williams had told him, and he in turn told McGregor, that Williams had stayed there at his, McGregor's, own request, because McGregor was not ready to take possession. Defoe further said the first rent he got from McGregor was on the 16th of November; and that he had some time before that made a final arrangement with McGregor about his complaint of not getting possession as he asserted, and about all past matters of difference between them.

Some time shortly before 15th November Defoe issued a distress warrant for \$100 for the five months' rent up to the 15th of October, and he endorsed upon it a deduction of \$12 in settlement of McGregor's complaint about not getting possession in time, although Defoe disputed the fact that McGregor had not got due possession; and McGregor paid the bailiff, who did not actually distrain, the balance of \$88. So that everything, according to that account of matters, was settled up to the 15th of October. Then on the 28th of November, McGregor paid \$20 further, and on the 7th of January he again paid \$20, and on the 3rd of February \$20 more, which paid all rent up to the 15th of January, 1886, as Defoe contended, and as the learned Judge found.

The rents, or charges, or whatever they may be called, as or in the nature of rent, were not paid on the 15th of February or the 15th of March, each payment being \$20; and a distress warrant was issued on the 18th of March for these sums, amounting to \$40, and a distress was made for the same. But before considering the acts that were done under the warrant, let me consider what the position of Mr. McGregor was with relation to the land, and the possession of it, at that time. His term for six months had

ended on the 15th of November; he nevertheless stayed on beyond that term. A tenant who continues to hold after the expiration of his term is a tenant at sufferance; his right under the term is gone; he is not a tenant at will, for he is there against the will of the owner; he holds therefore by that peculiar occupation which is not by right, and yet is not a wrong or trespass, for under the old law, when the doctrine of adverse or non-adverse possession was of so much consequence, a tenant at sufferance not having entered by wrong was not deemed to be holding adversely, merely by staying in possession when his tenancy had determined.

If the tenant at sufferance pay rent he is no longer on sufferance, but is in possession by the express will of the owner, and he becomes tenant at will if there is no other term definitely created; that is, he becomes a tenant by right, or from year to year, if he pay rent with reference to a yearly holding; or if not with reference to a yearly holding, but with reference to a monthly or weekly holding, he may become such monthly or weekly tenant, and in that case a week's or a month's notice would, it is assumed, be sufficient to give him, to put an end to his holding. In this case I infer from the conduct of the parties, the correspondence, and the times of payment of the rent, that from and after 15th November the relationship of landlord and tenant continued between the parties from that time until 15th March, at any rate, which is the only period of time we have to consider in the action, and that the holding was a monthly tenancy, which is in accordance with the finding of the learned Judge who tried the action.

The rent was in my opinion, therefore, rightly due, which was distrained for up to 15th March.

The proceedings taken by the landlords before the Judge of the County Court against the tenant, as one who was overholding, cannot operate against them, for they could not take such proceedings rightfully without having previously determined the tenancy by a good notice to

quit. Nor can the tenant, after opposing, and successfully, the landlord's right of procedure to eject him, set up now that the landlords are estopped from treating him as their tenant now, although they had treated him before as overholding or at sufferance only. The overholding proceedings for all purposes may upon the facts and circumstances of the case be disregarded without prejudice to either of the parties.

Then, as to the proceedings in making the distress. The officer got to the house about ten in the forenoon. He said when the door was opened to him he walked into the hall; he took an inventory of the articles he distrained and left a copy. Mrs. McGregor asked him to wait till she could telegraph to her husband in Toronto, and the bailiff said he would wait till noon, and if he was not paid by that time he would move the goods. Mr. McGregor was communicated with and he tendered the rent in Toronto to Mr. Defoe sometime in the middle of the day; Mr. McGregor said about half-past eleven. Mr. Defoe told him the warrant was in the bailiff's hands, and he would not interfere; he, Mr. McGregor, must settle with the bailiff. The warrant had been signed by the landlords themselves, and Mr. Defoe referred Mr. McGregor to them. Mr. McGregor then sent his clerk out, who tendered the \$40 rent to the bailiff, but not the costs of the distress; and it is said the clerk asked for and wanted a receipt in full, and the bailiff said he could not take the rent without the costs; and so the goods were brought into the city, a distance, it is said, of about six miles. Mr. McGregor, who had gone out to the premises, returned to the city and then paid the \$40 and costs, and he paid \$3 to have the goods removed back again; and they were restored to the same house, and he continued to hold the premises till the 15th of the next month, but did not pay the rent of it. It was allowed, however, against him as a counter-claim in the action. The learned Judge found, as the fact appears to have been from the evidence, that the distress was made before any tender was made for the rent.



What remains as matter of complaint on the part of the plaintiffs is :

1. That more goods than were proper for the satisfaction of the rent and costs were taken.
2. That they were removed a distance of six miles to the city.
3. That they were damaged by the removal.
4. That a washstand was lost, and
5. That the tenant had no notice of the distress and cause of taking the same, nor of the place where the goods were being taken to be impounded.

As to the alleged taking of an excessive quantity of goods, Gallagher, one of the bailiffs, valued the goods taken at from \$45 to \$50. When asked about the books he said : " We had some before ; they did not bring more than 20 cents apiece." Mr. McGregor said there were about 50 volumes, worth about \$300, besides the furniture.

The furniture taken, with a bureau not taken, was valued before the distress by Mr. Jenkins at Mr. McGregor's request, as Mr. McGregor wanted Mr. Jenkins to buy them, and he valued them at \$100, and he gave that sum for them after the seizure. That would seem to shew the furniture would probably have been a sufficient stock of goods to have taken in distress for the \$40 and the costs. The books apparently need not have been taken. But the learned Judge reports that an excess in any respect was not charged at the trial, and he found no excess was proved.

As to the removal of the goods to Toronto, that, I suppose was done to ensure a better market for their sale in case a sale was made, but in case they were redeemed it was putting the tenant to the expense of removing them and afterwards of returning them to the place where they were distrained, a distance each way of about six miles.

If the distress had been cattle, horses, or sheep, it would have been an abuse so to have acted if a public pound could have been found nearer, and as the distrainor had



the right to impound them on the premises; and that might have been done on these premises.

As to the goods which were taken, they could have been impounded on the premises, and by the Statute of Marlbridge they are not to be taken out of the county : 2 Inst. 107.

I am of opinion the plaintiffs cannot maintain an action for driving these goods six miles to the city, unless it was unnecessary to do so, and unless it was averred that the act was unreasonable or maliciously done to prejudice the plaintiffs.

As to the alleged damage by removal. The furniture, Mr. Jenkins said, had not been damaged, and he bought it, and he gave as much for it after the alleged damage to it as he had valued it at before the seizure was made.

As to the loss of the washstand ; it does appear to have been lost, although there is evidence to the contrary, or perhaps it should be said, evidence that it could not have been lost. The learned Judge properly, on the evidence, considered it to have been lost, and allowed Mrs. McGregor the value of it, \$12.

As to the want of notice of the distress, &c., see 2 Ch. on Pleadings, 6 ed. 503, for the precedent of an action for that cause, and the statutes, if they apply to this case.

The evidence shews the tenant had notice of the distress and of the cause of it, although not in the most formal manner ; and the notice as to the impounding could not be given, for the impounding had not been made before the goods were redeemed—they were on their way only to be impounded. If the impounding is thought to have been made when the goods were put upon the wagon, the tenant had notice of that act, for he saw the goods on the wagon, and he followed the wagon to Toronto, and there redeemed the goods, and he directed them to be taken back again.

The learned Judge found the plaintiff John McGregor was indebted to the defendants Tolfree and Taylor as landlord for one month's rent in the sum of \$20 from 15th March to and until 15th April, 1886, with such costs as

the law will allow on the counter-claim; and he dismissed the action of the plaintiff John McGregor, with costs, and he directed that judgment be entered for the female plaintiff for the sum of \$12 damages, with Division Court costs and subject to set-off as hereinbefore mentioned, and that judgment be entered for the defendants. I may say there could have been no necessity for suing eight persons for this small distress, and no pretence for claiming \$1,500 damages.

In all respects I am of opinion the disposal of the matters in controversy in the action was quite right, and that the motion of the plaintiffs' must be dismissed, with costs.

ARMOUR, J., and O'CONNOR, JJ., concurred.

*Dismissed, with costs.*

---

## [CHANCERY DIVISION.]

## McINTOSH V. ROGERS.

*Conditions of sale—No deeds to be produced other than those in the vendor's possession—Sale of land—Vendor and purchaser.*

By written agreement for the purchase of land it was provided "no title deeds, abstracts, or evidences of title to be required other than those in the vendor's possession, or shall the vendor be required to give a covenant for the production of the same."

*Held*, that under this condition the vendor was relieved from the absolute obligation of making a good title to the land; while if the evidence of title coupled with the abstract and it may be the public register did not disclose and prove a good title, the purchaser was not bound to complete, but in that event the vendor would not be liable for damages because of the above condition.

THIS was an action brought by Francis McIntosh against James Rogers, claiming specific performance of the following written agreement:

LONDON REAL ESTATE EXCHANGE, ALBION BLOCK, UPSTAIRS.

London, Ont., Nov. 19th, 1886.

I hereby agree to purchase from Mr. McIntosh through W. D. Buckle his agent, house No. 455 Waterloo Street, for the sum of fifteen hundred and forty dollars, payable as follows: The present mortgage held by Mr. Glass to be assumed by the purchaser, the balance to be paid in cash on completion and tendering of conveyance.

No title deeds, abstracts, or evidences of title to be required other than those in vendor's possession, nor shall the vendor be required to give a covenant for the production of the same.

(Signed)

JAMES ROGERS.

This offer to be good for one week from date.

(Signed)

JAMES ROGERS.

Possession to be given on the 1st January, 1886.

(Signed)

JAMES ROGERS.

The statement of claim in the usual way set out the agreement and alleged that the plaintiff had done all things on his part to be performed, but the defendant had not paid the purchase money or performed his part of the agreement.

By his statement of defence the defendant set up that:

3. "After the making of the said agreement, the plaintiff's solicitor furnished the defendant with an abstract of

the title and some of the title deeds to the said lands, but refused to verify the abstract or satisfactorily answer the defendant's requisitions on title, or to furnish to him any sufficient or satisfactory evidence or proof of title, or even to furnish to him the title deeds and evidences of title in the plaintiff's possession or control, although often requested so to do; nor has the plaintiff tendered to the defendant a sufficient or any conveyance of said lands as required by said agreement.

4. "The plaintiff has not at any time since the making or entering into of said agreement, furnished or presented to the defendant a good or sufficient title to said lands and premises, and the title deeds and evidences of title furnished to the defendant by the plaintiff, or which he has been able to obtain, do not shew a good title to said lands in the plaintiff, such as the defendant is bound to accept, and from such title deeds and evidences of title, it does not appear that the plaintiff has or can furnish or convey a good title thereto.

5. "The defendant submits that the plaintiff is bound to convey to him a good title to said lands, and to furnish him with proper and sufficient evidences of such title, and to sufficiently and satisfactorily answer and comply with his reasonable requisitions on title."

The defendant also set up other matter not necessary to be mentioned here, and by way of counter-claim, asked that the plaintiff might be ordered to specifically perform the contract on his part and furnish and convey to him a good title to the lands, with sufficient and satisfactory title deeds and evidences in proof of such title, and damages in default of the plaintiff being able to furnish a good title.

The action was tried before Boyd, C., at London, on March 18th, 1887.

*G. W. Marsh*, for the defendant, the purchaser, cited *Dart*, on Vendors and Purchasers, 5th ed., p. 155; *Osborne v. Harvey*, 7 Jur. 229; *Gabriel v. Smith*, 16 Q. B. 847, 858:

*Southby v. Hutt*, 2 M. & Cr. 207 ; *Symons v. James*, 1 Y. & C. C. C. 487 ; *Seaton v. Mapp*, 2 Coll. 556 ; *Rhodes v. Ibbetson*, 4 DeG. M. & G. 787 ; *Hoy v. Smythies*, 22 Beav. 510 ; *Edwards v. Wickwar*, L. R. 1 Eq. 68 ; *Canada Permanent Building Society v. Wallis*, 8 Gr. 368 ; *Harnett v. Baker*, L. R. 20 Eq. 50 ; *In re Marsh and Earl Granville*, 24 Ch. D. 11 ; *Leslie v. Preston*, 7 Gr. 434 ; *In re Higgins and Hitchman's Contract*, 21 Ch. D. 99 ; *In re Yielding v. Westbrooke*, 31 Ch. D. 344. The vendor must shew a good title.

*W. W. Fitzgerald*, for the vendor. The registry laws make a difference in the practice here from that in England. The plaintiff only asks exemption from production of deeds not in his hands or power, but not from conveying a good title.

April 6th, 1887. *BOYD, C.*—The sole point I have to decide is upon the proper construction of the contract of sale which is set forth in the pleadings, and is signed by the defendant only. It is in these words "I hereby agree, &c." The plaintiff admits that if he cannot convey a good title there is no sale, but the dispute is that the defendant claims it lies upon the plaintiff to shew or prove a good title at his own expense, and the plaintiff claims that he has to do this only so far as he has muniments of title in his own possession. Davidson says "conditions of sale must be so prepared as to be clear and intelligible to a man of ordinary understanding. They must clearly tell the purchaser what he is not to require ; and must not be of such a nature as to mislead or deceive him," *Prec. of Conv.* 3rd ed. Vol. 1 p. 442. This contract says plainly enough that "no title deeds, abstracts, or evidences of title are to be required other than those in the vendor's possession." It appears from the defence that an abstract of title has been furnished, and as its sufficiency is not complained of I assume that it is "complete" in the usual sense, and that a good title is exhibited on its face. Some of the title deeds it is alleged by the defendant have also been furnished, but not all that are in the plaintiff's possession or control. If this be so, the plain-



tiff is in the wrong at this point. But it is further asserted (and this is the *cruce*) that the plaintiff has refused to verify the said abstract outside of these, or to satisfactorily answer the defendant's requisitions on title. Hence the difficulties arise as to the verification of the abstract. *Primâ facie* the vendor should produce all deeds and evidences of title in his possession or under his control, and procure at his own expense copies of all others. But this term, which would be implied, is modified by the condition I have quoted, which goes to absolve the vendor from making verification at his own expense beyond the documents in his own hands. It would follow that information desired outside of this limit should be sought for at the purchaser's expense if he is anxious to complete the transaction. Now it is an ordinary condition to throw on the purchaser the expense of procuring evidence to verify the abstract, and that term is to some extent involved in the clause now under consideration: See *Cole Conditions of Sale*, p. 30; *Davidson's Prec. of Conv.* Vol. i. pp. 440, 490.

The purchaser is not to require from the vendor more extensive evidence of the title than is stipulated for, but he may take any objections to the title which he discovers anyhow and anywhere, and these, if well-founded, must be removed before the vendor can enforce the contract: *Shepherd v. Keatley*, 1 C. M. & R. 127; *Leslie v. Preston*, 7 Gr. 434; *Canada Permanent Building Society v. Wallis*, 8 Gr. 368; *Attorney-General v. Sitwell*, 1 Y. & C. Exch. at p. 571; *Waddell v. Wolfe*, L. R. 9 Q. B. 515. *Southby v. Hutt*, 2 M. & Cr. 207, was a very special case depending upon the conflict which arose in construing different clauses of the conditions. In the earlier part the vendor undertook to deduce a good title, which the Lord Chancellor said meant not only to exhibit it upon the abstract, but to shew a good title by proper verification. The subsequent provision as to non-production of deeds he therefore restricted to mean production for the purpose of delivery at the completion of the contract, and not production for the purpose of proving the abstract. The real

effect of the decision is perhaps best summarized by Lord St. Leonards when he refers to it as shewing that the seller may be bound to verify the abstract though there is an ambiguous provision as to the delivery of the deeds : *Law of Vendors and Purchasers* 14th ed. p. 430.

In this contract as I read it there is a restrictive condition by which the seller has guarded himself against being compelled to verify the title to all intents, but is compellable to do so to a certain extent only, and in the particular manner indicated. If the evidences of title coupled with the abstract, and it may be the public register do not disclose and prove a good title, I would say as at present advised that the purchaser was not bound to complete ; but in such a case the vendor may not be liable for damages, because by the condition he is relieved from the absolute obligation of making out the title to be good. The question is can a good title be made according to the terms of the contract ? If the evidence to be supplied by the vendor is insufficient to shew title, he cannot insist upon the sale being completed because the Court will not force less than a good title on a purchaser unless he has contracted in unmistakeable terms to accept less. That I understand to be the effect of the decisions in *Osborne v. Harvey*, 7 Jur. 229, and *Dick v. Donald*, 1 Bli. N. R. 655.

If the defendant is anxious to get the property, and believes that a good title exists though not fully shewn by the evidence to be derived from the vendor according to the contract, he must further investigate at his own expense. Or, if the vendor is anxious to complete, he may go beyond the letter of his contract, and supply what is required, though he cannot be compelled to do so. What may be the actual state of affairs in this particular case I do not know, but I have said enough upon the meaning of the contract to guide the parties if either desires to prosecute a reference as to title having regard to the terms and conditions of sale. The judgment will be for specific performance with reference as to title, and costs reserved till Master reports on all points affecting title and costs.

## [QUEEN'S BENCH DIVISION.]

## WINFIELD v. FOWLIE.

*Interpleader—Machinery in mill—Conveyance under R. S. O. ch. 104 and ch. 102, sec. 4—"General words."—Effect of on property adjacent to and used with property conveyed—Practice.*

In 1875 A. K. and H. K. entered into partnership as shingle makers for a term of years on equal terms and for the purposes of the partnership purchased in A. K.'s name a piece of land about 200 feet distant from the Georgian Bay, which was conveyed to him on 1st September, 1876. In the waters of the bay a shingle mill was erected which was connected with the land so purchased by a tramway which was filled from time to time with sawdust &c. The mill was so erected for the convenience of floating logs to it. H. K. advanced the money to pay for the mill and machinery. The partnership was never formally dissolved although H. K. ceased to interest himself in it subsequent to June, 1876.

In June, 1876, A. K. mortgaged the said land to J. K. by a mortgage in the statutory form to secure a sum of money advanced by the mortgagee to him, and H. K. to secure the said loan also executed a mortgage of his individual interest as partner in the said land. This last mortgage recited the partnership and was given at the request of the mortgagee who was aware of the existence of the partnership. The mill was in operation until the end of 1882, having been run by different persons in the interval. The land in the mortgages contained was sold under the power of sale therein, and, with the intention of getting the machinery, was purchased by defendant, who, under authorization removed the machinery. The land was conveyed by the same description to defendant by J. K. by deed, made pursuant to the Short Form of Conveyances Act R. S. O. ch. 102. H. K. subsequently executed a release of the land to the defendant.

Under an execution against A. K. the machinery was seized by the sheriff after having been loaded on the cars for defendant.

In an interpleader issue it was *held*, [O'CONNOR, J., dissenting] that the mill and machinery comprising the articles in question became part of the realty in such a manner as to pass under the mortgage of the land from A. K. and H. K. to J. K. by virtue of sec. 4 R. S. O. ch. 104; and by the deed from J. K. to the defendant under sec. 4 of R. S. O. ch. 102.

Remarks by Armour, J., on the inconvenience of the practice of making the execution creditor the plaintiff in interpleader where the goods when seized are in the possession of the claimant.

INTERPLEADER to try whether certain goods, which formerly formed part of a mill and machinery, seized in execution on 12th March, 1886, by the sheriff of Simcoe, under *fi. fa.*, tested 11th March, 1886, were, or some part

thereof was, at the time of the said seizure the property of the plaintiff as against the defendant.

The issue was tried at the last sittings of this Court at Barrie before O'Connor, J., and a jury.

It appeared that by articles of co-partnership, entered into on 18th March, 1875, Alexander Kean and Hugh Kean virtually agreed to purchase a parcel of land in the township of Tay, in the county of Simcoe, or elsewhere as to them might seem best, and to erect thereon a steam shingle factory, with such machinery and appliances as might be deemed necessary and advisable, and, so soon as the same was ready, to proceed to manufacture and sell shingles for their mutual benefit; to furnish, share and share alike, funds to carry on said business; to share profits and losses equally; to carry on the said business under the name of Alexander and Hugh Kean; to have each full power to enter into agreements under seal or otherwise for the purchase of timber or land for said business, and such partnership to continue for twenty years, unless sooner dissolved by mutual consent.

A parcel of land, containing about three acres, on the shore of the Georgian Bay, being part of lot 15, 7th con. Tay, was accordingly bargained for by Alexander Kean, and adjoining it, and about two hundred feet from it in the waters of the Georgian Bay, the proposed shingle mill was erected, and was connected with the said parcel of land so bargained for by a sort of tramway filled from time to time with sawdust and rubbish. The factory was so erected in the water for the convenience of floating the logs to it.

Hugh Kean said that he advanced the money required to build it, viz., \$600, and that he bought the steam engine and shingle machinery for the factory, and paid therefor \$1549.28. The factory was completed in June, 1875. Hugh Kean personally took no part in its erection, nor did he ever take any part in the management of it; he never got anything out of it, and although the partnership between L.M. and Alexander Kean was never formally



dissolved he seemed to have abandoned his interest in it, although he never formally released it, and he never saw the factory after June, 1876. On 1st September, 1876, a conveyance was made to Alexander Kean of the said parcel of land, describing it as bounded by the water's edge, by one W. D. Ardagh, for the expressed consideration of \$400.

On 1st June, 1877, by statutory mortgage, Alexander Kean mortgaged said parcel of land to John Kean to secure \$1,000, payable in nine months, with interest at eight per cent. per annum. On said 1st June, 1877, by statutory mortgage to the said John Kean, after reciting that the said Hugh Kean was in partnership with the said Alexander Kean, and was entitled under the terms of their partnership articles to an undivided one-half interest in the said parcel of land, the same being part of the assets of the said partnership, and that the deed of the said parcel of land was taken in the name of the said Alexander Kean alone, and a mortgage was given thereon by the said Alexander Kean to the said John Kean for \$1,000, and in order further to secure the said John Kean the said Hugh Kean had agreed to execute said mortgage, the said Hugh Kean mortgaged the said parcel of land to the said John Kean for securing the \$1,000, payable in nine months, with interest thereon at eight per cent. per annum.

John Kean swore that he advanced the \$1000 to Alexander Kean: that he refused to advance the money to Alexander Kean without getting the mortgage from Hugh Kean, because he knew the machinery was purchased by Hugh Kean, and it was to the machinery he trusted for his security: that he did not know that the factory was not on the said parcel of land: that he had never been repaid the \$1000, and had only been paid one year's interest thereon.

It appeared that the factory had been run from the time of its erection till the fall of 1882: that part of the time Alexander Kean had run it: that one McDonald had run it one year: that the plaintiff had run it one year by



the thousand for Alexander Kean: that one Baker had also run it one year: that in the fall of 1882 Alexander Kean had nailed it up.

On 26th June, 1883, the plaintiff recovered a judgment against the said Alexander Kean in an action for malicious prosecution, and thereon issued execution, and at once seized and sold the shingle machine and jointer and belts, and all the couplings of the engine, everything that was loose and that was not considered by the sheriff to be realty. Plaintiff was made aware at the time of this seizure that the said John Kean had a mortgage on the said parcel of land. The factory remained in this condition and unoccupied until the sale to the defendant hereinafter set forth. The said John Kean gave a power of attorney to one Frank Kean on 3rd September, 1885, to sell and make all agreements for the sale of the said parcel of land, "described in the deed thereof, dated 1st September, 1876, and made by W. D. Ardagh to one Alex. Kean." Acting under this power of attorney, the said Frank Kean sold the said parcel of land to the defendant for the sum of four hundred dollars, for one hundred dollars of which he gave his cheque on 11th February, 1886, and by statutory deed, dated 25th February, 1886, after reciting the mortgage made by the said Alexander Kean to the said John Kean, and that in said mortgage there was contained a proviso that in case the said John Kean should make default in payment of principal or interest for one month, the said John Kean might, without giving any notice to the said Alexander Kean, enter on and lease or sell the said parcel of land, the said John Kean did grant to the said defendant, in consideration of the sum of \$400, the said parcel of land.

On 8th March, 1886, the defendant closed the transaction by giving his note at three months for \$300, the balance of the consideration money, and took the following receipt: "Received from Albert Fowlie his note for three hundred dollars (\$300) in full of balance due me as agent for John Kean for the Alex. Kean property, mill and ma-

chinery at Victoria Harbour; and I hereby authorize the said Albert Fowlie to take possession, and to remove said mill and machinery at once, and agree that a proper title to the same will be produced by the said John Kean. (Signed), Frank Kean."

The defendant wanted to get a release from the said Hugh Kean, and this release was on 13th March, 1886, made by the said Hugh Kean to him of the said parcel of land.

John Kean swore that some two or three years before the trial he had a conversation with Alexander Kean relating to this mill and machinery, in which Alexander Kean told him that he could make nothing of it, and he had better go on and sell it.

William Crooks swore that in the spring of 1885 he met Alexander Kean in Toronto, and Alexander Kean told him that he had that mill in the harbour, and there was a boiler in it and some machinery, and he wanted him to take it out of the mill and ship it to him.

The defendant swore that his chief object in making the purchase was to get the machinery, and that he did not know that the mill was not on the said parcel of land. Frank Kean swore that in the sale to the defendant the value of the said parcel of land proved but a small part of the consideration: that on 8th March, under instructions from the defendant, he commenced removing the mill and machinery, and had it all removed and loaded on the cars except a few boards on the evening of the 10th March, and those were loaded on the cars by six o'clock on the morning of 11th of March. The execution under which the said property was seized was received by the sheriff at ten o'clock in the forenoon of 11th March, 1886. It did not appear in evidence whether the said parcel of land was used otherwise than as a means of access to the factory, but it was stated in argument that it was used as a piling ground for the factory.

The learned Judge directed the jury to find for the plaintiff, stating that if he was wrong there would be no

occasion for another trial, as all the materials would be before the Court.

On 18th May, 1887, *Kean* obtained an order *nisi* to set aside the verdict and enter it for the defendant upon the evidence, or for a new trial on the ground of rejection of evidence by the learned Judge.

On 25th May, 1887, *Lount*, Q. C., shewed cause, and *Kean* supported the order *nisi*.

June 28, 1887. ARMOUR, J.—The issue is erroneously framed, and taken as it is must be found for the defendant, for the goods in question were not the property of the plaintiff at the time of the seizure.

The issue may be amended, no doubt, under R. S. O. cap. 54, sec. 28, and R. S. O. cap. 50, sec. 270; but by what is it to be amended? It ought to be in accordance with the order, and if it is as ordered, the order ought to be amended. Then how ought the order and issue to be amended? I presume by substituting the words, "the property of Alexander Kean," for the words, "the property of the plaintiff."

This difficulty arises from the practice of making the execution creditor the plaintiff where the goods when seized are in the possession of the claimant—a practice which is extremely inconvenient, and is frequently productive of much injustice.

The factory and machinery, comprising the goods in question, when erected and placed, became, in my opinion, part of the realty in such a manner as to pass from mortgagor to mortgagee under a mortgage of the land upon which the same were erected and placed; and I have little doubt that Alexander Kean, when he gave the mortgage to John Kean, represented to him that he was giving him security upon them, and that he believed he was doing so, and that John Kean believed that he was getting security upon them, and that both Hugh Kean and John Kean believed that at the mortgage Hugh Kean was giving to

John Kean covered them. I have also little doubt that the defendant intended to buy, and believed he was buying, and that John Kean intended to sell, and believed he was selling them to the defendant.

The question, however, is, did they pass to John Kean by the mortgages from Alexander Kean and Hugh Kean respectively to him? If they did they were not at the time of the seizure the property of Alexander Kean as against the defendant. These mortgages were made in pursuance of the Act respecting short forms of mortgages, R. S. O. ch. 104, by the 4th section of which it is provided that "every such mortgage, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the lands therein comprised belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee, also the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof; and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, at law and in equity, of the grantor in, to, out of, or upon the same lands, and every part and parcel thereof with their and every of their appurtenances, subject always to the reservations, limitations, provisoes and conditions contained in the grant of such lands from the Crown."

I think it clear that under these very wide words the factory and machinery passed to John Kean.

The deed from John Kean to the defendant was made under the Act respecting short forms of conveyances, R. S. O. ch. 102; and sec. 4 of this Act is identical in terms with R. S. O. ch. 104, sec. 4, and consequently the factory and machinery passed under it to the defendant.



The cases upon the effect of the use in wills of such words as are used in this 4th section are to be found in *Jarman on Wills*, 3rd ed., p. 742, and upon the effect of the use of such words in deeds in *Smith v. Martin*, 2 Wm.s' Saunders 802. See also *Steele v. Midland R. W. Co.*, L. R. 1 Chy. App. 275; *Doe Meyrick v. Meyrick*, 2 C. & J. 223; *Doe Davies v. Williams*, 1 Hy. Bl. 25; *Smith v. Ridgway*, L. R. 1 Ex. 46, S. C. 331; *Ongley v. Chambers*, 1 Bing. 483; *Doe v. Langton*, 2 B. & Ad. 680; *McNish v. Munro*, 25 C. P. 290.

In my opinion the order must be absolute to enter the verdict for the defendant.

WILSON, C.J.—The question is whether the description of land in this case will carry a parcel of land lying outside of the precise words of the limits, and a mill or factory erected upon that outlying part.

The described land is of small value in comparison with the factory and its fixtures.

The deed was made on the 1st of September, 1876, under the Act respecting short forms of conveyances, by W. D. Ardagh, and his wife as to dower, to Alexander Kean. The land is described as being in the township of Tay, being composed of part of broken lot number 15, in the 7th concession, which may be described as follows; giving the courses, distances and limits. The second course takes the limit to the water's edge; that is, of Hog Bay, part of the Georgian Bay. Then the third course is easterly, following the course of the water's edge to a pond 22° 50' west, 3 chains, from the place of beginning, and thence in a straight line to the place of beginning.

The parcel was bought to erect a mill or shingle factory upon it. The factory was put up about 300 feet beyond the water's edge for the purpose of conveniently getting the logs required for the factory, the waters being there very shallow; and a way was constructed from the shore to the mill, and land was made there also for piling grounds.



A deed made under the statute contains very comprehensive words to pass "all houses, &c., to the lands comprised, belonging, or in anywise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken, or known as part or parcel thereof." These terms might not include the land or ground upon which the factory is built, as the grantor had no such enlarged rights vested in, or used, or claimed by him at any time, although the factory was built by Alexander Kean in June, 1875, and was in full operation when the deed was made to him. If these enlarged rights did not pass by that deed, Alexander Kean acquired them, it may be, by wrong when he took them in June, 1875.

Then Alexander Kean made a mortgage in fee on the 1st of June, 1886, to John Kean in fee, in the terms of the deed he had received on the 1st of September, 1876, by reference to the said deed; and by the Act under which the mortgage was made, respecting short forms of mortgages, the like provision is made which applies to deeds, that all houses, &c., shall pass. Then the mortgagor released all his claims upon the said land to the mortgagee, and these words embody the full language of number 13, in column 2, of the R. S. O. ch. 104, sec. 13, which are a release to the mortgagee of all the mortgagor's rights in the land "hereby conveyed or intended so to be, and every part thereof."

In June, 1886, Alexander Kean, and those claiming under him, acquired independently of the operation and effect of any of the conveyances which were made, a complete legal statutory title by length of possession to all the land, and properly claimed as part of the freehold.

The defendant commenced to move the contents of the factory on the 8th of March, 1886, and on the 10th of March they were all moved and loaded on the cars but a few boards, which were moved and loaded by six in the morning of the 11th of March, and the execution under which the property is claimed by the plaintiff was not received by the sheriff till ten in the forenoon of that day.

If the articles in question were attached to the factory until removed by the defendant after his purchase of the factory, they never were goods and chattels liable to be taken in execution.

They were not, if chattels, saleable excepting subject to the mortgage debt, and the partnership demands and the partner Hugh Kean claims against the same; and after the purchase by the defendant the articles, if chattels, became the absolute property of the defendant. In any view of the case the plaintiff has not established his title to the property in question.

I have no doubt the realty acquired by Alexander Kean outside the actual described limits of the purchase became vested in him and passed to his mortgagor John Kean under the very extensive language of the statutory form, and under sec. 3 of the R. S. O. ch. 104, which enacts that "any such mortgage or part of such mortgage which fails to take effect by virtue of this Act shall nevertheless be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if the Act had not been made;" for no one can doubt that Alexander Kean, the original mortgagor, would have been compelled to charge this factory and all the property used or connected with it, and more particularly when the very money advanced to him by the mortgage was for the purpose of being laid out upon and improving this factory and the adjoining lands, and was actually expended upon that property.

O'CONNOR, J.—The facts of this case are stated in the judgment of my brother Armour with sufficient fullness and accuracy, and the judgment of the Chief Justice gives enough of the description of the village lot, as stated in the deed from W. D. Ardagh to Alexander Kean, to answer the present purpose. The distance from the water limit—the limit on the side of the bay—of the village lot to the mill was about 220 feet. The descriptions in the mortgages and deed made afterwards follow the same description of the village lot, which is the only land comprised in the deeds and mortgages from first to last.

I have had the favour and advantage of perusing both the judgments herein, to which I have referred, and I regret to say that I am compelled to dissent from these judgments, and my reasons for so dissenting are as follows: The title of the Keans to the land commenced with the deed of conveyance from Mr. Ardagh to Alexander Kean 1st September, 1876. The consideration expressed in this deed is \$400. It cannot be and is not pretended that Mr. Ardagh conveyed or intended to convey anything more than the bare village lot, minutely described in the deed, limited towards the south by the water's edge of the bay, and from that limit the mill was three chains and seventeen links further south. The deed is in the short form of the statute, R. S. O. ch. 102, and doubtless the description comprehends all that is expressed in the 4th section of that statute. It does not appear that Mr. Ardagh had any right or claim of right to the water lot in the bay adjoining the village lot, nor had he any right whatever to the mill or the machinery thereof, and he does not appear to have pretended any right or claim thereto.

The mortgage from Alexander Kean to his brother John Kean for the expressed consideration of \$1,000 is dated the 1st of June, 1877, and is in the short form, R. S. O. ch. 104, the 4th section of which is like the 4th section of ch. 102, substituting the word "mortgage" for deed." It contained the usual power of sale to be exercised on default of payment.

I think it is worthy of observation that this mortgage does not give the particular description of the lot by metes and bounds, but refers to the deed from Ardagh for that description.

Then follows a mortgage from Hugh Kean to the same John Kean, bearing the same date, though not executed at the same time, as the mortgage from Alexander was.

This mortgage recites that Hugh Kean was (then) in partnership with one Alexander Kean, and was entitled, under the terms of their partnership articles, to an undivided one-half interest in the lands and premises therein-

after mentioned, the said lands being part of the assets of the partnership : that the deed of said lands was taken in the name of the said Alexander alone, and a mortgage given thereon by Alexander Kean to John Kean, for \$1,000 ; and in order the further to secure the said John Kean the said Hugh Kean hath agreed to execute the second mortgage.

Then it proceeds, " in consideration of the premises and of one dollar of lawful money," &c., the mortgagor grants and mortgages " an undivided one-half interest in all and singular that certain parcel or tract of land and premises," situate, &c., being composed of part of broken front lot number 15, in the 7th concession, &c., " which said part is fully described in a conveyance thereof dated the first day of September, 1876, whereby one William D. Ardagh and wife conveyed the said lands to the said Alexander Kean." Proviso—Mortgage to be void on payment of one thousand dollars, with interest at eight per cent., in one month after date of the mortgage.

This mortgage was afterwards discharged by an instrument in writing in the form provided by statute for the discharge of mortgages, bearing date the sixth day of March, 1886, and registered in the proper registry office.

By that instrument, signed by John Kean, he acknowledges that Hugh Kean " hath satisfied all money due on, or to grow due on a certain mortgage made by the said Hugh Kean to me the said John Kean, which bears date the first day of June, A.D. 1877."

Prior, apparently, to this discharge, however, John Kean, by deed, made on the 25th day of February, 1886, in pursuance of the Act respecting short forms of conveyances, in consideration of \$400, conveyed the same village lot to the defendant, under the power of sale. In that also the deed of the 1st of September, 1876, from Ardagh, is referred to for the particular description ; and the blank covenants contained in the printed form, for the right to convey—that is, good title ; for quiet enjoyment, and for further assurances, are struck out. The next document that appears is a deed of quit claim for the nominal con-



sideration of one dollar, made by Hugh Kean to the defendant, which also refers for particular description to the deed from Ardagh. In not one of these deeds and mortgages is there a word referring to a mill, a factory or the machinery thereof, or of any kind of machinery, or to chattels of any kind: nothing is referred to in any of them, but the bare village lot. Neither is there a word having reference, proximately or remotely, directly or indirectly, to business of any kind, or to any special uses of the land conveyed or charged. The sole question, therefore, is whether the effect of the words of the 4th section of the statute respecting short forms of mortgages is such as to include the machinery in question in this case. My opinion is strongly to the contrary.

In order to form an intelligent judgment of the matter, with reference to the question presented, I think it is necessary to consider in the light of the evidence not only the relative positions of the places—the village lot and the mill or factory site, but also the purpose for and manner in which they were used with reference to the business—“a steam shingle factory.”

The mill or factory was erected over the water of the bay, where the water is about twelve feet deep, and rests on cribs sunk in the water so as themselves to rest on the land or rock, as it may be, under the water. From the mill to the dry land of the village lot a tram-way was erected, which was supported over the water in the same way and by the same means as the mill itself was. In the course of time the sawdust and rubbish taken from the mill were thrown into the water under a portion of the tramway and filled it up; but under and immediately around the mill the water remained about as it was originally. The tram-way was used for carrying or moving the shingles manufactured at the mill to the village lot, to be piled up thereon, as a mill yard is used for piling thereon the lumber made at a saw mill; and I presume it afforded, also, the way to King street for sending the shingles to market, the only means of egress which the user of the mill would have by right for land exportation.



The site on which the mill was erected was not the property of Alexander Kean or of the partnership composed of Alexander and Hugh Kean, but of the Crown, and was under the management of the Government of the Province of Ontario; and if the machinery of the mill ever became a fixture to the soil, and therefore part of the realty, it became the property of the Government, and would pass to a stranger by a conveyance, not of the village lot, but of the water lot or mill site.

On the other hand, if the machinery never became a fixture, but continued to retain its character of a chattel, it could hardly, I think, pass by a conveyance of the village lot—the piling yard, the use of which was only servient to the operation of the mill and machinery. Certainly I think the conveyance of the village lot did not convey the water lot, or even the use of it, as against the Crown. The mill site was the dominant tenement, and I utterly fail to see how anything in, of or upon the dominant, could pass to a stranger by a conveyance of the servient, tenement.

Machinery, chattels of any kind, pass with land only when placed on and attached to it, and then only because it has by reason of its attachment become part of the realty. Here, as already intimated, the machinery was not on the land conveyed, but on the land which belonged, not to the grantor, but to the Crown.

A right of way, and a servient tenement appurtenant to and used with a parcel of land, passes with a grant or conveyance of the land, especially when specified, as they were in the long forms of conveyance generally used before the Statute introduced the short forms now in general use. But even without the right of way mentioned certain easements, such as a right of way of necessity or of long user, passed with a mere conveyance of the land to which they were appurtenant, as did other hereditaments, corporeal and incorporeal, in particular cases.

As regards the words comprised in the 4th section of the statute, they are merely to be considered as if they were

expressed in the deed in the appropriate place, precisely as they were in the old, long form of deeds generally in use before the statute, but the use of which has been superseded by the short form of the statute. The statute gives these words neither greater nor less force than, nor any different meaning, or force from, that which they had in the old form, or which they would have now if expressed in the deed itself. In fact the only difference between the use of the one or of the other is, that when the long form was used, and the whole deed or mortgage was read over and explained the parties to it knew, or had the opportunity to know, the one what he was conveying, and the other what he was taking by the conveyance; but now, with the use of the statutory short form, I venture to assert that not eighty in a hundred know or suspect that the simple words, "grant and mortgage," in the mortgage (grant in a deed of conveyance) mean a concatenation of words, which include all the categories of reality and possibility, and of necessity and contingency; and so completely has the statutory short form the effect of abstracting the real conveyance, known to and understood by the parties, from the words unknown to them, locked up in the statute, that even lawyers daily using these short forms, seldom, if ever, think of the statutory effect of the short form in that respect. But those words, of which the parties to the deed or mortgage, as the case may have been, have the same effect afterwards, when dug out of the statute by some industrious lawyer, for the purposes of a suit, as if they had been spread out on the face of the deed or mortgage, and been consciously and understandingly made the language of the parties thereto. I refer to the subject in this way merely to demonstrate that the statutory form of conveyance, deed or mortgage, means no more than did the old long form which has been, in practice, superseded, and should be construed, at least with no greater, enlargement or effect.

In *Kay v. Oxley*, L. R. 10 Q. B. 360, the language of the conveyance was substantially, if not literally, the same as

in the mortgage and other conveyances herein. There the question arose respecting an easement—a right of way necessary to the full enjoyment of the premises conveyed, and which was in use as a way when the conveyance of the dominant tenement was made, and the grantor being owner of both the dominant and the servient tenements before and at the time when the conveyance was made.

*Barkshire v. Grubb*, 18 Ch. D. 616, was another case of the same kind: the operative words of conveyance were the same as the statutory words in this case. The question there, also, was of a right of way—a right of necessity which would probably, under the circumstances, have passed by a bare conveyance of the land, without the amplifying words relied on in this action. In that case also the dominant and the servient premises belonged to the same person.

The mortgage in this case, from Alexander Kean to John Kean, merely conveys and charges the village lot, by distinct metes and bounds, with the appurtenances, &c.

Had the mortgage been of the village lot, and of the mill and machinery, and the appurtenances, with the understanding that the business was to be continued, I could understand a contention like the present one on behalf of the defendant; or, even if there was no understanding as to the continuance of the business, I could see ground for argument. It appears to me very clear that to hold that the mortgage from Alexander Kean to John Kean conveyed the machinery of the mill is carrying the construction of such instruments further in that direction than any decided case, certainly further than any decided case that I have met with, warrants; and as regards the relation of the tenements, as dominant and servient, it appears to me the contrary of what has been heretofore held to be law, and is therefore a *non sequitur*.

*Watts v. Kelson*, 6 Chy. App. 166, is another leading case on the subject to the same effect as the two I have above cited, and is referred to in the case in 18 Ch. D.

It appears to me that to concede the defendant's contention would be contrary to every received method of reasoning. Such a conclusion cannot be arrived at by analysis, and, therefore, not by deduction, because it is not contained in the premises, or either of them, and so it would be obtained by an illicit process ; nor by synthesis, because that would add to the subject what does not belong to it, has no analogy to it, and cannot be logically predicated of it ; nor by induction, for a generalization of the cases leads to a contrary conclusion.

*Order nisi absolute to enter verdict for defendant.*

---



## [QUEEN'S BENCH DIVISION.]

## DEAN V. THE ONTARIO COTTON MILLS COMPANY.

*Master and servant—Negligence—47 Vict. c. 39, s. 15, sub-s. 1 (O.)—49 Vict. c. 28 (O.)—Evidence omitted at trial—Admission of—Terms.*

In defendants' dye-house a number of vats were used for boiling cotton. In the course of his employment, as a dyer in defendants' factory, in which he had been employed at the same work for about three years, it was necessary for plaintiff to stand on the top of one of these vats, the cover provided for which consisted of several boards, whose average diameter was 5 feet 6 inches by 10 inches, the vat being 5 feet. About 3rd December, 1886, plaintiff complained to defendants' foreman that these boards were insufficient in number to cover the vat completely, but defendants did not remedy the defect; and on 6th of same month, while at work standing on them, one of the boards slipped sideways, precipitating plaintiff into the boiling liquid. Defendants thereafter remedied the defect. A similar accident had occurred in the factory two years before.

*Held*, setting aside a non-suit, in an action brought by plaintiff for damages, that there was sufficient evidence of negligence on defendants' part, in not having had the vat "securely guarded," in compliance with the Ontario Factory Act, 1884 (47 Vic. ch. 39, sec. 15, sub-sec. 1), to have justified a jury in finding for plaintiff.

*Per* WILSON, C.J. The plaintiff could not recover under the Workmen's Compensation for Injuries Act (49 Vic. ch. 28), because he was barred by the maxim *volenti non fit injuria*, under *Thomas v. Quartermaine*, 18 Q. B. D. 685.

*Per* ARMOUR, J., that independently of the Factory Act there was evidence of negligence on defendants' part to entitle plaintiff to sue under sub-sec. 1 of sec. 3 of the Workmen's Compensation for Injuries Act, and that the maxim *volenti, &c.*, had no application to the facts of this case.

*Thomas v. Quartermaine, supra*, considered and distinguished.

The Court, on the argument, allowed the plaintiff, on terms, to give in evidence the proclamation bringing into force the Ontario Factory Act.

## STATEMENT OF CLAIM :

(1.) That plaintiff was, at the time of the injury complained of, a workman within the meaning of "The Workmen's Compensation for Injury Act, 1886," and was employed by the defendants in their factory in the city of Hamilton. (2.) That defendants were at the said time employers within the meaning of the said Act. (3.) That as such employers it was the duty of the defendants to supply, provide and use in their said factory and business proper and sufficient ways, works, machinery and plant

for the purposes thereof. (4.) That a portion of the duty of the plaintiff, while in the employment of the defendants, was to assist in the dye house in the said factory in the boiling and dyeing of cotton. (5.) That on 6th December, 1886, he sustained personal injury owing to the negligence of the defendants, by reason of a defect in the condition of ways, works, machinery, or plant connected with and used in the factory and business of the defendants, to wit; in the said dye house the defendants had for the purposes of their said business, a number of vats or kettles for the boiling of cotton in the process of dyeing same, and during such process, said vats or kettles were filled with scalding liquid, and after the cotton was sufficiently boiled in said vats or kettles it was removed to an inclined box at the rear of said vats or kettles and attached thereto, and placed at a higher elevation from the floor than said vats or kettles, to drip, so that the dye or liquid from said cotton might drain back into the vat or kettle from which said cotton had been removed: that said vats or kettles were raised from the floor about five feet, and were open at the mouth, and it was necessary to have coverings for said vats or kettles placed across the mouth thereof whereon to stand for the purpose of removing the cotton from the dripping box and depositing it upon the floor of the dye house: that defendants neglected to provide proper and sufficient coverings for said vats or kettles, but supplied a number of boards insufficient to cover the same and of insufficient length, the same being barely long enough to reach from edge to edge of said vats or kettles, and said boards were not provided with fastenings to attach same to said vats or kettles, and to keep same firm in their proper place, and to prevent them from slipping, so that said boards were liable to slip when workmen were employed thereon, owing to the moisture from the vats or kettles and their insufficient length and lack of proper fastenings: that plaintiff, while employed at one of said vats or kettles on said date, and while there lawfully using the covering therefor supplied by defendants, and standing thereupon for the pur-

pose of removing the cotton from the inclined box and depositing the same upon the floor, as was necessary and proper for him to do in the course of his employment, fell into said vat or kettle, by reason of said boards having slipped from their position and of the said defects, and received severe burns and other injuries, and was incapacitated from pursuing his work for a long period of time, and incurred loss of wages, and suffered pain of body and mind, and incurred a large outlay for medical and other attendance. (6.) That defendants at the said date and long prior thereto were well aware of the defects aforesaid and negligently omitted to remedy the same.

The defendants by their statement said, (1) that they did provide proper and sufficient covering for the vats and kettles in the dye house in their factory, and that the same, when properly arranged and placed on the said vats and kettles, were proper and sufficient and safe for the purpose for which they were intended; but the plaintiff, whose duty it was and who was specially paid by the defendants for so doing, at the time mentioned in the statement of claim, neglected to place all the said boards or covering on the said vat or kettle, and to arrange the same properly thereon, and by his own neglect the said accident happened to him. (2) Defendants denied that they were aware of any defects as in the statement of claim mentioned. (3) That if there were any defects in the said planks or coverings the plaintiff was well aware of them, and failed within a reasonable time to give or cause to be given information thereof to the defendants, or to some person superior to himself in the service of the defendants.

#### Issue.

The cause was tried at the last sittings of this Court at Hamilton before Cameron, C. J., and a jury.

It appeared from the evidence for the plaintiff that he was employed by the defendants as a dyer, and had been so employed for about three years, and was at the time of the injury complained of employed in dyeing cotton black :

that for this purpose there were in the dye house three vats or kettles containing the liquid used for such dyeing, which was boiled by means of steam injected into each vat or kettle through a pipe: that the cotton was placed in these vats or kettles and boiled for a certain time: that it was then taken out and placed in boxes, of which there was one to each vat or kettle, which rested in part upon the top of such vat or kettle, and when this was sufficiently done the cotton was thrown from the boxes to the floor as near to the extractor as possible, through which it was then put. The vat or kettle in which the plaintiff was injured was 4 ft. 9 in. deep, and from 4 ft. 8 in. to 4 ft. 9½ in. in diameter at the top or mouth from inside to inside; the box was 3 ft. 6½ in. wide, 3 ft. 6½ in. deep, and 3 ft. 8 in. high, and protruded over the top or mouth of the vat or kettle 4 inches, and on the opposite side from the box was the steam pipe, the side of which nearest to the box being 4½ inches from the side of the vat or kettle opposite to the box, thus leaving an open space between the edge of the box and the steam pipe of from 3 ft. 11½ in. to 4 ft. 1 in. The steam pipe could, however, be pressed close up against the side of the vat or kettle, and this would proportionally increase the open space. In order to throw the cotton from the boxes on to the floor it was necessary for the persons throwing it to stand upon the top of these vats or kettles, and to enable them to do so loose boards were provided to be placed across the tops or mouths of these vats or kettles for them to stand on when so engaged. There were only nine boards provided for the three vats or kettles, so that when all the vats or kettles were being used, as they were at the time of the injury complained of, there were only three for each vat or kettle. These boards were of various widths and various lengths, averaging about ten inches wide and six feet long, and when placed in position would leave a considerable space between the box and the steam pipe uncovered. These boards, from the nature of the work carried on, were wet and slippery, and there were no cleats or steps on them



to prevent their sliding. The plaintiff swore that a few days before the injury complained of he asked one Linn, the foreman or man in charge of the dye house, for some boards to put on the kettle, and told him that there were not enough, and that it was dangerous on account of the steam, and that Linn said he did not know where plaintiff could get them, that he would have to steal them: that he tried the day before in the yard to see if he could get any, but he could not find any: that at the time of the injury complained of there were only three boards that he could get to put on the top of the vat or kettle, and that he was standing upon these and throwing the cotton from the box on to the floor when the board nearest to the steam pipe slipped toward's the pipe and one end of it dropped into the vat or kettle, causing him to fall in, by which one foot and leg was badly scalded.

Evidence was given to show the dangerous character and insufficiency of the mode adopted of covering the vats or kettles, and that a like accident had previously happened from the same cause to another man; and that after the accident to the plaintiff the defendants had the boards cleated to prevent their slipping. Mr. Snow, the general manager of the defendants, swore that Linn was the overseer of the dye house: that he, Snow, knew exactly the state of the plant in the dye house: that he was aware of the provisions of the Factory Act, having read it, and that there were eleven boards for the three vats or kettles instead of nine as deposed to by other witnesses. Notice was proved to have been given under the Act 49 Vic. ch. 28, sec. 7 (O.) The learned Chief Justice was of opinion that the case was not distinguishable in principle from the case of *Thomas v. Quartermaine*, on the ground that the plaintiff had full knowledge of the condition of the planks and used them, and thereby, under the maxim "*Volenti non fit injuria*," and the case referred to, he was not entitled to recover, and there was no evidence to go to the jury, and he therefore dismissed the plaintiff's action with costs.

On June 2nd, 1887, *Lynch Staunton* moved to set aside this judgment, and for a new trial, on the following grounds : (1) That the learned Judge erred in withdrawing the case from the jury, there being sufficient evidence to warrant them in finding for the plaintiff; (2) that there was evidence of negligence on the part of the defendants to go to the jury; (3) that there was no evidence of contributory negligence on the part of the plaintiff, or at least not of such contributory negligence as would warrant the action being withdrawn from the jury; (4) that the proximate cause of the injury complained of was the negligence of the defendants; (5) that the questions of negligence and contributory negligence were questions for the jury; (6) that the nonsuit was against law and evidence; (7) And on grounds disclosed in the notes of evidence taken at the trial.

*MacKelcan*, Q.C., shewed cause.

The cases cited appear in the judgment.

June 28, 1887. ARMOUR, J.—The case of *Thomas v. Quartermaine*, 17 Q. B. D. 414, and 18 Q. B. D. 685, upon the authority of which the learned Chief Justice dismissed this action is quite distinguishable from it in two essential particulars.

In that case there was no statutory obligation upon the defendant to securely guard the vat in which the plaintiff was injured. In this case there was a statutory obligation upon the defendants to securely guard the vat in which the plaintiff was injured. In that case the plaintiff had never complained of the vat being unfenced; in this case the plaintiff had complained of the vat not being securely guarded.

Vats are required to be fenced in England only upon the request of an inspector under the circumstances and for the purposes mentioned in the Factory and Workshop Act, 1878, 41 Vic. ch. 16, sec. 7. Vats are required to be securely guarded in Ontario by the Ontario Factories Act, 1884, 47 Vic. ch. 39, sec. 15, sub-sec. 1, of which provides that in

every factory all belting, shafting, gearing, fly wheels, drums, and other moving parts of the machinery ; all vats, pans, cauldrons, reservoirs, wheel races, flumes, water channels, doors, openings in the floors or walls, bridges, and all other like dangerous structures or places shall be as far as practicable securely guarded ; and I am of opinion that the provisions of this section are sufficiently wide to make it obligatory upon the defendants to securely guard their vats upon which their workmen have to stand in the necessary performance of their work against the occurrence of such an injury to them as that complained of by the plaintiff. This being so there was evidence to go to the jury of negligence in the defendants in not having the vat in which the plaintiff sustained the injury complained of securely guarded. It was quite practicable for them to do so, but they did not do it.

There was some discussion upon the argument as to whether or not the plaintiff relied at the trial upon the provisions of the Ontario Factories Act, 1884. The proclamation bringing it into force was certainly not proved, but one would be inclined to suppose from the examination of Mr. Snow, and the questions put to him by counsel and by the Chief Justice, that it was assumed to be in force. However this may be, it was, in fact, in force at the time of the injury complained of, and we ought not to deprive the plaintiff of the benefit of its provisions, but ought to allow him to obtain the benefit of them on some terms.

I am also of the opinion that apart altogether from the Ontario Factories Act, 1884, there was evidence to go to the jury. The injury complained of by the plaintiff was not an injury happening to the servant within the scope of the danger which he and his employer both contemplated as incidental to his employment when he entered upon it ; and at all events after he complained of it he could not be said to be volens within the sense of the maxim, *volenti non fit injuria*. It was the duty of the employer to exercise due care that the vats should be in a reasonably safe and proper condition for the servant to go upon in the performance of his work, or to provide safe and proper cover-

ings to be put upon the vats by his servant before going upon them, and I do not think that by continuing in his service after he complained he disentitled himself to maintain the action. See *Holmes v. Clark*, 6 H. & N. 349, 7 H. & N. 937.

The injury was caused to the plaintiff by a defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer arising from the negligence of the defendants, and of which the defendants were well aware.

I am of opinion the judgment should be set aside, and a new trial ordered, with costs to be costs in the cause.

WILSON, C. J.—The statement of claim alleges the plaintiff sustained personal injury owing to the negligence of the defendants by reason of a defect in the condition of the ways, &c., connected with and used in the factory and business of the defendants, to wit: \* \* the defendants neglected to provide proper and sufficient covering for said vats or kettles, but supplied a number of boards insufficient to cover the same and of insufficient length, barely long enough to reach from edge to edge of the vats or kettles, the boards not being provided with fastenings to keep them from slipping, so that the same were liable to slip when the men were employed thereon; and the plaintiff while employed on one of the said vats or kettles, and using the covering therefor supplied by the defendants, and standing thereon, as it was necessary and proper for him to do in the course of his employment, fell into the vator kettle by reason of the boards having slipped, and received severe burns; and the defendants then and long prior thereto, as the plaintiff knew, were well aware of the defects aforesaid, and negligently omitted to remedy the same.

That last allegation, "that the defendants, *as the plaintiff well knew*, were well aware, &c.," shews, I think, *the plaintiff knew*, as well as the defendants, of the defect which caused the injury; and in that case *Griffiths v. London and St. Katharine Docks Co.*, 12 Q. B. D. 493, affirmed in 13 Q. B. D. 259; *Williams v. Clough*, 3 H. & N. 258,



shew that at the Common Law the plaintiff cannot recover. The Act 47 Vic. ch. 39, sec. 15, (O.) enacts that "all \* \* vats \* \* and all other like dangerous structures or places shall be as far as practicable securely guarded;" and that "A factory, in which there is a contravention of this section, shall be deemed to be kept unlawfully, and so that the safety of any person employed therein is endangered."

As that statute requires the vats, &c., to be securely guarded, as far as practicable, the plaintiff was entitled to the protection of that statute; and if the defendants had failed in their duty in that respect, the responsibility of accidents happening was at the risk of the defendants: *Clarke v. Holmes*, 7 H. & N. 937; *Thomas v. Quartermaine*, 18 Q. B. D., at p. 696.

Then the 49 Vic. ch. 28, sec. 3, (O.) under which Act this action was brought, enacts that "where after the commencement of this Act personal injury is caused to a workman, (sub-sec. 1,) by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer," and the word *plant* will apply to the boards to be placed upon the vats which were and are complained of.

Then sec. 5 enacts that "a workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say:

1. Under sub-sec. 1 of sec. 3, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition.

3. In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give or cause to be given information thereof to the employer or some person superior to himself in the service of the employer unless he was aware that the employer or such superior already knew of the said defect or negligence."

The evidence shewed that if the defect had not been discovered or remedied it might properly have been inferred to have arisen from the negligence of the employer, whose duty it was to see that the ways, &c., were in proper condition.

And the evidence also shewed that in fact the plaintiff, knowing the defect in question, had given information to the employer or to some one superior to himself in the service of the employer, and it had not been remedied.

It was not known at the trial that the 47 Vic., ch. 39 (O.), had been called into operation by proclamation according to section 41 of that Act; but in fact the proclamation had issued for that purpose a few days before this action was commenced.

The action was dismissed under the Act of 1886, because it was held the plaintiff not only knew of the defect, but was a consenting party to the use of the vats in their unprotected condition; and he was barred by the maxim, *volenti non fit injuria*. It is hard to apply that maxim in many cases against a workman when the choice before him is to run the risk or give up his work, or starve. But this was a factory "kept unlawfully" by the Act of 1884, as it endangered the safety of the plaintiff, and I think the plaintiff may recover under that statute. Under the Act of 1886, according to the case in 18 Q. B. D. 685, the plaintiff could not recover, because by section 3 the workman is to have "the same remedy as if he had not been a workman"; and one *not* a workman may be barred as a consenting party, to his own injury, under the maxim, *volenti, &c.*, as well as a workman. The Master of the Rolls dissented in this case, and no doubt it will be taken to the House of Lords.

I agree the dismissal of the action should be set aside on the terms stated, for the plaintiff may, I think, recover under the Act of 1884.

O'CONNOR, J., concurred in the conclusion arrived at.

*New trial, costs to be costs in the cause.*

## [CHANCERY DIVISION.]

## GILL V. GILMOUR ET AL.

*Marriage settlement—Children's portions—Vested interest—Vesting at birth payable at full age.*

By antenuptial settlement made in 1881, as reformed afterwards by decree of this Court, C. G. being possessed of \$25,000, and also of £1,000, conveyed these sums to trustees on trust after the marriage to pay the income to her to her separate use, and after her decease to pay the said income, or such part as she should appoint to R. G., her intended husband, during his life, and after his death, on trust, "to and for any child or children of the said intended marriage, share and share alike if more than one, and if only one, then to such one in trust to apply the yearly income revenue and increase arising from the said trust funds and estate towards the maintenance, support and education of such children during their respective minorities, each child to receive his or her share of the principal of said trust fund and estate on his or her attaining the age of 21 years, or in case of females on attaining such age or being married."

The marriage took place, and C. G. died in 1884, leaving R. G. her surviving, and two children, issue of the marriage, H. R. G. G., and A. G. G., the former of whom, however, died in 1886, under age.

*Held* that H. R. G. G. took a vested interest at birth in the moiety of the sums of \$25,000 and £1,000, and that R. G., his father, was entitled, as next of kin of H. R. G. G. to a moiety of said amounts, and that letters of administration should be taken out to his estate before the same could properly be paid to R. G.

THIS was a special case stated for the opinion of the Court, pursuant to O. J. A., Order XXX., wherein the plaintiff was Robert Gill, and the defendants Allan Gilmour, and Allan Gilmour Gill, an infant under the age of 21 years, and was as follows :

I. By deed of gift, bearing date the seventeenth day of January, 1878, duly executed at the City of Quebec \* \* before William Bignell, a notary public, Allan Gilmour \* \* did give and grant unto Charles Farquharson Smith \* \* and to Allan Gilmour, one of the above-named defendants, as trustees on behalf of Caroline White and her two daughters Caroline Gilmour and Mary Gilmour, the sum of \$50,000.

To have and to hold the said sum of \$50,000 unto the said Charles Farquharson Smith and Allan Gilmour, and the survivor of them in trust, to invest and re-invest the same, and to pay over to the said Caroline White [since deceased] half yearly to and for her own use and benefit during the term of her natural life all interest, revenues and other profits arising from the said investments, and after her decease to pay the capital thereof unto the said Caroline Gilmour and Mary Gilmour equally between them share and share alike upon Mary Gilmour the younger of them attaining the age of twenty-one years.

2. The said Charles Farquharson Smith, on or about the sixth day of August, 1883, departed this life, and the said defendant Allan Gilmour, pursuant to the powers contained in the said deed of gift, by deed bearing date the twenty-eighth day of September, 1883, appointed the plaintiff Robert Gill co-trustee with himself in the place and stead of the said Charles Farquharson Smith, and the said Robert Gill accepted said trust.

3. By deed bearing date the nineteenth day of September, 1881, in contemplation of an intended marriage between the plaintiff Robert Gill and the said Caroline Gilmour, the said Caroline Gilmour did grant and convey to the defendant Allan Gilmour and one David Gilmour, among other things, all her estate, right title, interest, share, reversion, remainder and possibility as well vested as contingent, and in expectancy of her the said Caroline Gilmour, of, in, to, and out of the said sum of \$50,000, and also a further sum of £1,000 sterling, belonging to the said Caroline Gilmour, to hold the said trust funds upon trust for the said Caroline Gilmour until the said marriage, and thenceforth, upon trust, to pay the yearly revenue and increase therefrom unto the said Caroline Gilmour during her natural life, and for her separate and inalienable use during any coverture on her sole receipt free from the debts or control of her intended husband, and from and after the decease of the said Caroline Gilmour upon trust to and for any child or children of the said intended marriage share and share alike, if more than one, and if only one, then to such one in trust to apply the yearly income revenue and increase arising from the said trust funds and estate towards the maintenance, support and education of such children during their respective minorities, each child to receive his or her share of the principal of said trust funds and estate on his or her attaining the age of twenty-one years, or in case of females on attaining such age or being married, whichever shall first happen. And in case of the said Caroline Gilmour having no issue by such intended marriage, then [as she should by any deed or will appoint, and in default of appointment, on trust for the personal representatives.]

4. Subsequently the said Caroline Gilmour intermarried with and became the wife of the plaintiff Robert Gill, and there was born to her, issue of the said marriage one Harold Robert Gilmour Gill.

5. Subsequently, in an action brought in this Division, at the suit of the said Caroline Gilmour, to which the said Harold Robert Gilmour Gill and the defendant Allan Gilmour and the said David Gilmour were defendants, a judgment was pronounced bearing date the sixteenth day of November, 1883, by which the said marriage settlement was reformed and the following clause inserted therein after the words: "After the decease of the said Caroline Gilmour upon trust," "to pay the yearly income, and increase therefrom, or upon such part thereof as the said Caroline Gilmour, by any deed executed in the presence of one witness, or by any will or wills made by her, notwithstanding her coverture, shall direct and appoint unto her intended husband Robert Gill, her surviving, during his natural life, and in default of such appointment, or upon the decease of said Robert Gill, etc."

6. Subsequently there was born to the said Caroline Gilmour issue of the said marriage the defendant Allan Gilmour Gill.

7. The said Caroline Gill [*née* Gilmour] departed this life on or about the nineteenth day of April, 1884, having first duly made and published her last will and testament, bearing date the twenty-fifth day of May, 1882, and two codicils thereto bearing date respectively the twenty-fourth day of October, 1883, and the



sixteenth day of November, 1883, and leaving her surviving the plaintiff Robert Gill, her husband, and the said Harold Robert Gilmour Gill and Allan Gilmour Gill, her only children.

8. In and by the said will and codicils the said Caroline Gill did, among other things, give unto the plaintiff Robert Gill, during the term of his natural life, the whole income, profit and increase of the interest of the said Caroline Gill in the said sums of \$50,000 and £1,000 sterling.

9. The said David Gilmour desiring to be discharged, and the defendant Allan Gilmour and the said David Gilmour desiring to appoint the plaintiff Robert Gill as a trustee in the place and stead of the said David Gilmour, they did, by deed bearing date December, 1885, appoint the plaintiff Robert Gill as a trustee in the place and stead of the said David Gilmour, and the said plaintiff Robert Gill accepted the said trust.

10. The said Mary Gilmour, on or about the twenty-third day of August, 1885, attained the age of twenty-one years, and pursuant to the said deed of gift of the seventh day of January, 1878, she became absolutely entitled to and received from the plaintiff and the defendant Allan Gilmour one-half of the said sum of \$50,000.

11. The said Harold Robert Gilmour Gill departed this life on or about the eighth day of January, 1886, being an infant within the age of twenty-one years, leaving no debts; and leaving him surviving his father the said Robert Gill, and his brother the defendant Allan Gilmour Gill.

12. The defendant Allan Gilmour Gill is still an infant within the age of twenty-one years.

The questions submitted for the opinion of the Court are:

(1) Whether the said Harold Robert Gilmour Gill, at the time of his death, was entitled to a vested interest in the said sum of £1,000 sterling, and in the moiety of the said sum of \$50,000, to wit, in the sum of \$25,000, and was then entitled to a vested interest in the said sums of \$25,000 and £1,000 sterling in equal shares with the defendant Allan Gilmour Gill.

(2) Whether upon the death of the said Harold Robert Gilmour Gill the plaintiff Robert Gill, as his next of kin, became entitled to one-half of the said sums of \$25,000 and £1,000 sterling.

(3) Whether letters of administration should be taken out in the Surrogate Court for the estate of the late Harold Robert Gilmour Gill before the plaintiff Robert Gill, if so entitled should receive one-half of the said sums of \$25,000 and £1,000 sterling.

The case came on for argument on February 16, 1887, before Boyd, C.

*Cassels*, Q.C. for the plaintiff. The share of one child cannot go to the surviving child. If both children die under twenty-one there is no provision for the property if not vested. In the case of a fund of pure personalty there is no difference between a settlement and a will. I refer to *Pearman v. Pearman*, 33 Beav. 394; *Wadley v. North*, 3 Ves. 364;

*Webster v. Leys*, 28 Gr. 475 ; *Town v. Borden*, 1 O. R. 327 ; *Latta v. Lowry*, 11 O. R. 517 ; *Elphinstone's Rules for the Interp. of Deeds*, p. 367, 383, 392 ; *Howard's Trusts*, 7 Ir. Ch. 344 ; *Re Orme*, 1 Ir. Ch. N. S. 175 ; *Bardon v. Bardon*, 16 Ir. Ch. 415 ; *Reilly v. Fitzgerald*, 6 Ir. Eq. 335 ; *Evans v. Scott*, 1 H. L. Cas. 43.

*MacLennan*, Q. C., and *Hoskin*, Q. C., for the infant defendant. The gifts to the children vest at 21, or marriage if daughters, and till then there is no vesting, because the gift is to a class reaching a given period. If both die under 21 the fund is undisposed of, and remains the property of the wife and mother. This is a marriage settlement, and no argument can be deduced from the fact of part not being settled. The maintenance clause does not come into operation while the parents live, because they take for life. The fund is thus not required until the child is 21, and it is not till then vested, and the maintenance clause makes no difference. They referred to *Elphinstone's Rules for the Interp. of Deeds*, p. 393, 396, 399 ; *Emperor v. Rolfe*, 1 Ves. sr. 208 ; *Wakefield v. Maffet*, 10 App. Cas. 422.

*R. S. Cassels*, for Allan Gilmour, trustee.

April 6, 1887. BOYD, C.—*Jopp v. Wood*, 2 DeG. J. & S. 323, was the case of a marriage settlement, and lays it down that as to money portions under a trust for children generally subject to their parents' life interests, to be paid at 21 or marriage, they take vested interests at birth, the time of payment only being postponed. That appears to disclose the principle which governs the construction of this settlement. In *Wadley v. North*, 3 Ves. 364, the bequest was contingent on the children surviving the tenant for life—that is not the condition on which they take here—but only that they are children of the intended marriage. There is no gift over in case of any child dying, and the language used as to each receiving the *corpus* speaks of the share of each

child as then existing, which indicates an earlier vesting, which can only be on birth, as no other period is indicated. The language of the will seems to bring it within the operation of Rule 100 of *Elphinstone's Rules for the Interp. of Deeds*, p. 383, The first question I answer in the affirmative; to the second and third I answer that letters of administration should issue in respect of this fund as the estate of the deceased infant, and that his father, the plaintiff, is beneficially entitled thereto as sole next of kin.

A. H. F. L.

---

[CHANCERY DIVISION.]

RE LEWIS AND THORNE.

*Vendor and Purchaser—Equitable interest in proceeds of lands under a trust for sale—Fi. fa. against lands.*

Trustees under the will of F. S., holding certain lands by virtue thereof on trust to sell as soon as conveniently might be after her decease, and distribute the proceeds among her children, one of whom was D. V. L., contracted to sell the said lands to one H. T. There were at the time writs of *fi. fa.* in the sheriff's hands against the lands of D. V. L., some of which had been placed therein before the date of the said contract.

*Held*, nevertheless, that the said writs did not form any incumbrance on the lands in the hands of the trustees so as to prevent them conveying the same to a purchaser indefectibly, and that any share of the purchase money which D. V. L. was entitled to he would get as personal, not as real estate.

*Held*, also, that the purchaser was not bound to see to the application of the purchase money.

THIS was an application under the Vendor and Purchaser Act, the petition setting out that Henry Lewis and John Dunkerson Lewis, executors and trustees under the will of Frances Lewis, deceased, who died on August 11th, 1886, had, by agreements in writing, dated respectively November 17th, 1886, and November 19th, 1886, agreed to sell to Horace Thorne certain lands, which passed to the

vendors under the will of the said Frances Lewis upon trust, as soon as conveniently might be after the death of the testatrix, to sell the same, and out of the proceeds pay funeral and testamentary expenses and just debts, and divide the balance among her children in equal shares; that the vendors duly obtained probate of the will on August 27th, 1886; that one of the children entitled to share in the proceeds of the real estate, was Daniel Vault Lewis: that there were certain writs of execution in the hands of the sheriff of York against the lands of the said Daniel Vault Lewis, which writs had been placed in the sheriff's hands in September and October, 1886, except one which had been placed in the sheriff's hands on December, 18th, 1886; that the purchaser objected that these executions were a charge and encumbrance on the interest in the said lands of the said Daniel Vault Lewis, and that the vendors were bound to pay and discharge them in order to convey the lands to the purchaser free from incumbrance, and the vendors asked for a declaration that the said executions should be declared not to be encumbrances on the said lands, or any share or interest therein; and that they could make a good title to the said lands free from encumbrances, without payment of the said executions, and that the purchaser was not bound to see to the application of the purchase money.

The matter came on for argument on May 25th, 1887, before Boyd, C.

*F. Hodgins*, for the vendors.

*R. Snelling*, for certain of the execution creditors.

*Dixon*, for another execution creditor.

*G. H. Watson*, for the purchaser.

The following cases were cited on the argument: *Singleton v. Tomlinson*, 3 App. Cas. 404; *Fisken v. Brooke*, 8 A. R. 8; *Hermann* on the Law of Executions, pp. 196, 198; *Scott v. Scholey*, 8 East 497; *Russell v. Lewis*, 2 Pick. 507.



BOYD, C., held he could not hear execution creditors or bind them, and that they should be dismissed with costs as of attending and watching briefs, and afterwards delivered judgment as follows :

May 26th, 1887. BOYD, C.—As to executions against lands coming in after the contract to sell, I do not think they can possibly affect the devolution of title as between vendor and purchaser. (See per Mowat, V. C., in *Parke v Riley*, 3 E. & A. at p. 237.)

As to executions against lands before the contract to sell, I think that they do not interfere with the right of the trustees to sell so as to carry out the directions of the will; and as a matter of conveyancing, they do not derogate from the right of the trustees to convey the estate indefectibly. I do not need to decide what the effect of the executions is on the share of the proceeds of the sale coming to the beneficiary who is the execution debtor, for I am not in a position to know what is coming to him, or for what purpose the sale is being made. But, assuming that this execution debtor is to get some share of the purchase money, he would get it as personal and not as real estate. The lien arising from the execution on the trust estate held by the executors for the benefit to some extent of the execution debtor, would not be more than an equitable lien, and it would in the ordinary course be worked out by proceedings in equity to realize the lien. The extended form of working out relief would be by compelling the trustees to convey or transfer to the debtor the legal interest so as to be made available at law. But in the circumstances of the present case, that legal interest would be represented not by any interest in the lands, but by a share of the proceeds of the lands, *i. e.*, in its legal shape it would be personal and not real estate, and if so, then I conceive that the execution against lands cannot so affect the title as to form any obstacle to a satisfactory conveyance being made by the vendors. Nor do I see that the

purchaser is required to look after the application of the purchase money in view of R. S. O. ch. 107, sec. 7.

The Court has no jurisdiction to deal directly with the execution creditors on these summary applications under the Vendor and Purchaser Act, and as to them the petition should be dismissed with costs, taxed on the footing of their being unnecessary parties.

As to the other costs they should be borne by the purchaser whose contention fails.

A. H. F. L.

---

## [QUEEN'S BENCH DIVISION.]

## HENDERSON V. KILLEY ET AL.

*Partnership—Dissolution—Agreement by new firm to pay debts of old—  
Right of creditors to enforce—Creation of trust.*

K. & M., having carried on business under the name of K. & Co., dissolved partnership, and K. gave M. sixteen promissory notes for \$500 each, with interest, for his share in the business, which was continued by K. K. afterwards, by agreement under seal, formed a partnership with O., to continue until a joint stock company should be formed to take over their assets, and K., by this deed, was to transfer to the co-partnership, as his contribution to the capital, all the assets of his business, to be taken at a valuation, subject to the deduction of his liabilities, which were to be assumed by the co-partnership and charged against him. Amongst K.'s liabilities, known to O., were ten of these notes, which he had endorsed to the plaintiff before they fell due. The company was formed, and K. transferred his interest to it. The new firm paid two of the notes, with interest on others, and there were negotiations for an extension of time to pay the whole. The assets of K. transferred to the new firm were sufficient to pay his liabilities.

*Held*, that though the plaintiff could not have sued upon the deed, not being a party to it, the circumstances established the relationship of trustee and *cestui que trust*, and entitled the plaintiff through K., as her trustee, to enforce performance of the stipulation in the deed for payment of the notes held by her.

THE plaintiff by her statement alleged (2) that on or about 14th November, 1881, the defendants Killey and Muirhead, who had been carrying on business as iron founders under the name of J. H. Killey & Co., dissolved partnership, and said Killey gave his promissory notes for \$8,000 in all to Muirhead in settlement of Muirhead's share in said business of J. H. Killey & Co., and said Killey thereafter carried on the business of J. H. Killey & Co ; (3) that said Killey on or about 14th November, 1881, in settlement as aforesaid, made and signed sixteen promissory notes to said Muirhead for the sum of \$500 each, eight of which said notes had been paid, and eight of which were unpaid and were payable, respectively, as follows, at 24, 33, 36, 39, 42, 45, 48 and 51 months from the date thereof, to the order of said Muirhead, with interest ; (4) that Muirhead endorsed said last-mentioned eight notes to

plaintiff before they respectively fell due, and the same were at maturity duly presented for payment, and were dishonoured by Killey, of which Muirhead had due notice; (5) that Muirhead had not appeared, and final judgment had been signed against him for the amount of said notes and interest; (6) that on or about 29th February, 1884, defendants Osborne, (W.), Killey and Osborne, (R. B.), entered into a certain agreement under seal, whereby they mutually agreed to enter into co-partnership from that date as iron founders, &c., under the name of the Osborne-Killey Manufacturing Company, said partnership to continue until a joint stock company should be formed; (7) that said Killey was then possessed of the assets, property and goodwill of the business of J. H. Killey & Co., which he agreed to transfer and deliver over to said new partnership as his contribution to the capital thereof, and said Osbornes (W. and R. B.) agreed to transfer and deliver over to said new co-partnership, as their contribution to the capital thereof, the foundry, plant, shops, and property appurtenant thereto then recently rented or purchased by said Osborne (W.); and it was further provided by said agreement that all liabilities of J. H. Killey & Co. were to be assumed by said new co-partnership and charged against said Killey; (8) that defendants Osborne (W.), Killey and Osborne (R. B.) formed said partnership, and paid certain of the liabilities of said J. H. Killey & Co. they had agreed to pay, and defendants agreed to pay and discharge said notes, and paid interest on one of said notes, and said defendants offered, if extension of time were given, to pay said notes at the rate of one hundred dollars (\$100) per month; (9) that by reason of the promises of defendants plaintiff forbore to bring an action on said notes heretofore; (10) that defendants refused to pay any of said notes, which were all unpaid except \$60 interest for two years on one of said notes, paid June 17th, 1884. Plaintiff alleged that all times had elapsed and all acts had been done necessary to entitle plaintiff to be paid said notes and interest by defendants, and before action brought



plaintiff demanded payment of said notes and interest, but received no reply to such demand ; (11) that if defendants, forming said firm of The Osborne-Killey Manufacturing Company, were not proved to be liable as debtors to plaintiff under the circumstances thereinbefore set forth plaintiff charged, in the alternative, that defendants duly received the assets of said Killey and deducted said debt of plaintiff therefrom, and took credit therefor as a liability assumed to be paid by them ; and plaintiff charged that defendants, in refusing to pay plaintiff said debt, were colluding to defraud her, and so to arrange the accounts of said partnership that they might be relieved as between themselves from said liability ; and plaintiff claimed that under the circumstances thereinbefore pleaded defendants were estopped from denying their indebtedness to plaintiff, and that in any event plaintiff was entitled to judgment for the amount against defendant Killey, and to an order restraining defendants from parting with the assets set apart to provide for said debt or from denying the nature of the accounts between said parties, and that a receiver should be appointed to receive and realize said assets and the share and interest of said Killey in said firm until said debt should be fully paid.

Defendant Killey, by his statement of defence, alleged : (1) That the said promissory notes were obtained from him, by said Muirhead, by means of representations made to him in behalf of said Muirhead that the value of said Muirhead's share of the business of the partnership's firm of J. H. Killey & Co. was \$8000, or more than that sum ; (2) that said representation was wholly false, and the share or interest of said Muirhead in said business was at the time of the making of said notes of no value whatever ; (3) that there never was any value or consideration for the making or payment of said notes by him, Killey ; (4) that plaintiff was not, at the commencement of the action, the lawful holder of said notes, or any of them ; (5) that if plaintiff was the holder of said notes, or any of them, she took them after they became due, and with notice of the

matters thereinbefore referred to, and always held the same without value or consideration.

The defendants, the Osbornes, by their statement of defence, pleaded 1, 2, 3, 4, & 5, the same defences as set up in paragraphs 1, 2, 3, 4, & 5 of the defendant Killey's statement of defence, and (6) that they were induced to enter into the agreement of 29th February, 1884, by fraudulent representations made to them on behalf of defendant Killey, that the assets of J. H. Killey & Co. were of much greater value than the same then in fact were; (7) that upon a revision, made after 29th February, 1884, of the list of the stock and tools of J. H. Killey & Co., as standing in the books of the firm, it was found that such list was incorrect, and that the assets of J. H. Killey & Co. had been greatly overvalued, and that when correctly valued they would not cover their liabilities, and in consequence of such wrong stock taking and excessive valuation the defendants Osborne had, at the time of the release thereafter mentioned, paid more than the full value of said assets, and that defendant Killey thereupon agreed that the defendants Osborne, having been induced to enter into the agreement of 29th February, 1884, by the false representation of value contained in said stock list, should be released from any further claims in respect to the liabilities of J. H. Killey & Co., and defendant Killey did by deed acknowledge that defendants Osborne had paid the full value of the assets transferred to the Osborne-Killey Manufacturing Company, under said agreement of 29th February, 1884, and did thereby release and discharge defendants Osborne from all claims and demands whatsoever under or in respect of any of the debts or liabilities of J. H. Killey & Co., which might not have been paid by defendants, Osborne; (8) that all the property and assets of the firm of J. H. Killey & Co., which had not been previously sold or disposed of, was on 25th February, 1885, transferred by defendant Killey to the Osborne-Killey Manufacturing Company, of Hamilton, (Limited), a company duly incorporated under the Ontario Joint Stock Companies' Letters

Patent Act, and such transfer was agreed to and confirmed by defendants Osborne, and in consideration thereof defendant Killey received credit for the sum of \$5585, as a payment upon the shares subscribed for by him in the capital stock of said company; (9) that defendants Osborne did not admit the allegations in the statement of claim; (10) that defendants Osborne denied that they agreed to pay and discharge said notes, or agreed, if an extension of time were given, to pay said notes at the rate of \$100 per month, and they said that no such agreement or offer was made by them in writing, or was signed by them or by any person thereto by them lawfully authorized, and they claimed the benefit of the Statute of Frauds with respect to any such agreement or offer; (11) that defendants Osborne submitted that the statement of claim shewed no privity of contract between them and plaintiff nor any cause of action whatever against them, and that this action should be dismissed as against them, with costs.

#### Joinder of issue.

The cause was tried at the last sittings of this Court at Hamilton before Cameron, C. J., who dispensed with the jury during the progress of the cause.

Plaintiff produced and proved the eight promissory notes, to recover the amount of which this action was brought, each dated 14th November, 1881, and each being for the sum of \$500, with interest, made by defendant J. H. Killey, payable at 24, 33, 36, 39, 42, 45, 48, and 51 months, respectively, to the order of defendant Muirhead, and by him endorsed to plaintiff. It appeared that defendants Killey and Muirhead had been prior to 14th November, 1881, copartners in business, under the name of "J. H. Killey & Co.", as iron founders: that they then dissolved partnership, defendant Killey buying out the share or interest of defendant Muirhead in said business for the sum of \$8,000, for which he gave him his 16 promissory notes, bearing that date, of \$500 each, payable at different dates thereafter, and that the notes upon which this action

was brought were eight of those notes : that J. H. Killey, after said dissolution, carried on said business under the name of "J. H. Killey & Co." until 29th February, 1884, when the following agreement was made :

"Memorandum of agreement made this 29th February, 1884, between William Osborne, of the city of Hamilton, manufacturer of the first part, Joseph H. Killey, of the same place, manufacturer of the second part, and Robert Bryson Osborne, of the same place, gentleman, of the third part. The said parties hereby mutually agree to enter into co-partnership from this date as iron-founders and manufacturers of steam engines and boilers, and other machinery, under the name and firm of the Osborne-Killey Manufacturing Company, said partnership to continue until a joint stock company shall be formed as hereinafter provided. The said parties further agree that they will, in conjunction with such other parties as may agree with them to become shareholders, and as they may be willing to accept as such shareholders, form a joint stock company under the Ontario Joint Stock Companies Act, with a capital of \$100,000, to be called the Osborne-Killey Manufacturing Company, for the purpose of carrying on said business and taking over the assets and property of the said co-partnership. The said Joseph H. Killey agrees to transfer and deliver over to the said co-partnership, as his contribution to the capital thereof, all the assets, property and goodwill of his business, and all contracts and orders now on hand, or which may hereafter be received by him. The said William Osborne, and Robert Bryson Osborne, agree to transfer and deliver over to the said co-partnership, as their contribution to the capital thereof, the foundry, plant, shops, and property appurtenant thereto, recently erected or purchased by the said William Osborne, and consisting of lots numbered 121 to 134, inclusive, in John Ferguson's survey in the city of Hamilton, excepting such parts of said lots as belong to the Hamilton and North-Western Railway Company, and also all stock in trade, iron, lumber, coal and other property on said premises. The said William Osborne shall have the entire control of the finances of said business, including the making of all purchases; and the said Joseph H. Killey shall have the charge and management of the shops, including the making up of orders, and the making sales of all manufactured goods on hand; and the said Robert Bryson Osborne shall perform



the duties of cashier. The property of the said William Osborne shall be taken by the said co-partnership at its cost up to the first day of March of this year, including all wages paid up to that date. The property of said Joseph H. Killey shall be taken by said co-partnership at the valuation recently made and entered in the stock book and inventory of machinery and tools of J. H. Killey & Co. as audited by W. F. Findlay, subject to a further amount of purchases and sales from the 31st day of December last to this date, and subject to the deduction of all liabilities of J. H. Killey & Co., which are to be assumed by the said co-partnership and charged against said Killey, and of any losses that may accrue or expenses that may be incurred in collecting or realizing the outstanding accounts or other debts; and also subject to the deduction of the value placed upon the street roller, which is not to be transferred to the said co-partnership until a purchaser shall be found for the roller, when the amount realized for it shall be put to the credit of the said Joseph H. Killey as part of his contribution to the capital of said co-partnership. The said parties shall be mutually interested in the business of the said co-partnership in proportion to the amounts contributed by them respectively to the capital thereof. The said Joseph H. Killey shall be entitled to draw from the said co-partnership the sum of \$18 per week for his services, and the said William Osborne and Robert Bryson Osborne the sum of \$10 per week for their services, such sums to be charged against the expenses of said business, and to be payable until the joint stock company aforesaid shall be formed, or until the said parties shall otherwise mutually agree.

In witness whereof the said parties hereto have hereunto set their hands and seals.

(Sgd.) J. H. KILLEY, [L.S.]

(Sgd.) WM. OSBORNE, [L.S.]

(Sgd.) R. BRYSON OSBORNE, [L.S.]

Signed, sealed, and delivered in presence of

(Sgd.) F. MCKELCAN.

Among the liabilities of J. H. Killey & Co., referred to in the above agreement, and known to defendants Osborne at the time of entering into it, were ten of the notes given by defendant Killey to defendant Muirhead and by him endorsed to plaintiff, amounting to \$5,000, and the accrued

interest thereon, amounting to \$687.95. After said agreement was entered into the new firm, the Osborne-Killey Manufacturing Company, through their cashier, paid two of said notes held by plaintiff, and also in like manner paid on 17th June, 1884, \$60 interest for two years up to November 17, 1883, upon the notes payable at 24 months, and also paid \$82.50 interest on the note payable at 33 months, and also paid \$90 interest to November 17, 1884, on the note payable at 36 months.

Plaintiff asked: Q. What did you do after Mr. Killey went into partnership with the Osbornes—what did you say to them? A. I saw old Mr. Osborne, Mr. William Osborne; that was when the first of these notes was due; it was after I had heard of the partnership with Killey; I went down to collect for this note, and Mr. Osborne said he had not money at the present time, but he would pay by giving him time. Q. Did Mr. Osborne know how much you held—how many notes you held? A. He knew I held all the notes at the time; there had been \$1,000 paid to my brother before this; he knew at that time I held \$4,000; he said they had not this money then, but they wanted time and they would pay it. Q. Well, what did you do as to that? A. Of course I could not do anything; he told me to call again; I called several times, and still the same answer; then I got interest on that one; there is the endorsement on it; I saw old Mr. Osborne again after that and got the same answer—they had not money to pay them then, but to give them time; I waited. Q. Tell me, what interviews you had with the young man Bryson Osborne? A. When I saw him in the office he just told me the same as his father did, that they had not money to pay them; afterwards he gave me interest on the second one, that is, he gave me interest twice; I got that from the young man. Q. What did he say with reference to the rest of it? A. It was always to give them more time; they wanted the time extended; William Osborne spoke one time of giving \$100 a month one day I was there. Q. Did you ever get any definite payment

from Bryson, the young man? A. No; he came up to my place on Superior street and wanted to speak about that, but I told him I would like to see my sister before I would do anything—that is just two years ago last Christmas; he gave me the interest on the several notes at that time. Q. What did he want with you at that time; what was his errand? A. Well, it was to see about giving them longer time; they wanted to fix them so they would come one after the other—\$500 every three months; I told him I wanted to see my sister before I would do anything about it; my sister and I then went down to see Mr. William Osborne. Q. What passed between you and the old gentleman? A. By that time it seems they were getting to think they would not pay them at all; I went down several times and didn't see him; they have not paid any of the principal; I hold all the notes. Q. And what do you know of the payment of the other two notes? A. Well, it was my brother got the payment; there was one of them I know I had to put my name to to help to get a renewal; I had to put my name to get the renewal discounted. Mrs. Edminston, a daughter of the plaintiff, said that she went for her mother the day after the note payable at thirty-three months fell due, to see the Osbornes and Killey to get the amount of it; that she saw Bryson Osborne; that he could not pay her, but told her to come down the next day and he would pay her the interest; that she did so, and he gave her a cheque for \$82.50; that her aunt told her that as the interest had been so long she should get back interest on it; and she went back next day and Bryson Osborne gave her the back interest; that when the next note came due, the note payable at thirty-six months, she thought in November, she went down again and saw Bryson Osborne, and presented the note; he said they came so close together he wanted see her mother about extending the notes, and said he would come to see her, but did not come on the day appointed; she and her mother and Bryson Osborne, however, met the next day, and he paid her mother \$90 interest on the note

payable at 36 months: that her mother said that she and Bryson Osborne had been speaking about extending the time for the notes: that her mother wanted to get 7 per cent. if she extended the time, and she believed it was something about that they held out about: that her mother wanted to see her brother and sister before she would do anything about it: that afterwards she (witness) had a conversation with William Osborne about her brother George, who had been in the foundry, and the proposal was that George should go into the foundry, and that her mother's money should be left in it, with a view to George becoming a partner: that her mother did not wish to leave her money in the foundry.

Bryson Osborne said: Q. Did you ever have any conversation with the plaintiff in regard to these notes? A. I had when she came down there, but not any extended conversation. Q. Do you recollect whether anything was said by you as to the payment of these notes? A. I never said anything definitely; she came down with a note and I said she had better see my father about it; I would not pay it. Q. What further took place, if anything? A. Well, there was nothing further between us of any particular consequence. Q. Do you recollect whether any proposal was made by you to extend the time for the payment of these notes? A. There was not; I never made any such proposal; I never made any proposal to pay the notes to anybody.

William Osborne said: Q. What conversations did you ever have with the plaintiff with regard to these notes that are sued on here? A. Very much as the plaintiff says. Q. Did you ever make a proposal to pay \$100 a month? A. No; that is one thing I do not recollect ever being named. Q. Did you, or did you not, ever promise to pay these notes, or anything to that effect? A. No; I do not think I ever did; do not think I ever made promise to pay.

Letters patent of the joint stock company, formed on 17th December, 1884, were put in, and also an indenture



bearing date 25th February, 1885, made between Joseph H. Killey, of the city of Hamilton, manufacturer, of the first part; William Osborne and Robert Bryson Osborne, of the same place, manufacturers, of the second part; and The Osborne-Killey Manufacturing Company, of Hamilton, (Limited), of the third part; whereby Killey, in consideration of the amount of \$5,585 being allowed upon the shares subscribed by him in the capital stock of the company, with the consent of the parties of the second part, transferred all his interest in the business formerly carried on by him in the name of J. H. Killey & Co., and all his interest in the business then carried on by him and the parties of the second part, to the said company.

The stock taking made by Findlay and referred to in the memorandum of agreement of 29th February, 1884, shewed Killey's surplus, after deducting all liabilities, including that to the plaintiff, at \$16,583.40. The Osborne-Killey Manufacturing Company paid all the liabilities of J. H. Killey & Co., with the exception of the plaintiff's claim and that of one Armstrong; and in order to, if possible, defeat these claims Killey and the Osbornes agreed to revaluations of the assets of J. H. Killey & Co. and after this action was commenced, and on 1st September, 1886, by indenture, bearing that date, and made between Joseph H. Killey, of the city of Hamilton, manufacturer, of the first part, and William Osborne and Robert Bryson Osborne, of the same place, manufacturers, of the second part, after reciting the memorandum of agreement of 29th February, 1884, and that upon a revision of the list of the stock and tools of J. H. Killey & Co., as standing in the books of the firm it was found that such list was incorrect, and that the assets of J. H. Killey & Co. had been greatly overvalued, and that when correctly valued they would not cover their liabilities, and in consequence of such wrong stock taking and excessive valuation the parties of the second part had already paid more than the fully value of the said assets, and said party of the first part had agreed that said parties of the second part, having been induced to

enter into the agreement thereinbefore referred to by the false representations of value contained in said stock list, should be released from any further claims in respect of the liabilities of J. H. Killey & Co., it was witnessed that said party of the first part did thereby acknowledge that said parties of the second part had paid the full value of, the assets transferred to the Osborne-Killey Manufacturing Company under the agreement of 29th February, 1884, thereinbefore mentioned, and did thereby release and discharge said parties of the second part from all claims and demands whatsoever under or in respect of said agreement or for or in respect of any of the debts or liabilities of Joseph H. Killey & Co. which might not have been paid by said parties of the second part.

The learned Chief Justice found that the defendant J. H. Killey & Co. made the notes in plaintiff's statement of claim mentioned, and that the same were endorsed by defendant Walter Muirhead before they became due to plaintiff, for valuable consideration, and that there was no fraud or misrepresentation practised to induce defendant J. H. Killey to make said notes, and that there was due by said defendant J. H. Killey for principal and interest on said notes the sum of \$5,074.17; and he directed that judgment be entered for plaintiff against defendant J. H. Killey for the said sum of \$5,074.17, with costs of suit. He found further as facts that the consideration for said notes was the capital or interest of defendant Walter Muirhead in the firm of J. H. Killey & Co., of which said Walter Muirhead was a partner, that after the dissolution of said firm of J. H. Killey & Co. said J. H. Killey carried on business by himself under the firm name of J. H. Killey & Co. from November, 1881, until February, 1884, when he entered into co-partnership with defendants William Osborne and Robert Bryson Osborne, upon the terms that said firm should take the assets of said J. H. Killey & Co. and assume to pay the liabilities of said J. H. Killey & Co., among which was the liability of J. H. Killey & Co. on the notes in plaintiff's statement of claim: that afterwards,

and after the maturity of the notes payable 24, 33, and 36 months after date, defendants, the Osbornes, as representing the firm of the Osborne-Killey Manufacturing Company, paid interest on said notes; and he found that the assets of the firm of J. H. Killey & Co., transferred to the firm of Osborne, Killey & Co., were sufficient to pay all the liabilities of said old firm of J. H. Killey & Co., including plaintiff's claim, and said defendants, the Osbornes, on behalf of said Osborne, Killey & Co., paid two notes made by H. J. Killey and endorsed by said Walter Muirhead to plaintiff. He did not find that defendants, the Osbornes, made any direct promise to pay the notes in plaintiff's statement of claim mentioned, but until they positively refused the same they did not directly repudiate liability thereon, but merely stated that they had not moneys at the time to pay with. He dismissed the plaintiff's action against defendants, the Osbornes, with costs, on the ground that they were no parties to the notes sued on, and there was no direct liability to plaintiff, and their liability was to defendant Killey, who did not require them to make the payment.

On 3rd June, 1887, *Osler*, Q. C., moved to set aside the judgment for defendants, William Osborne and Robert Bryson Osborne, and to enter judgment for the plaintiff, on the grounds that upon the evidence and law, judgment should have been given for the plaintiff.

*Robinson*, Q. C., and *MacKelcan*, Q. C., shewed cause.

June 28, 1887. ARMOUR, J.—The evidence given by the plaintiff and her daughter, with respect to conversations with the defendants Osborne on the subject of the plaintiff's claim, although denied in part by the defendants Osborne, as shewn by their evidence, ought to be believed in preference to that of the defendants, and I so find, because the conversations were such as would probably have taken place, the defendants Osborne at that time intending to pay the plaintiff, and because the sub-

sequent conduct of the defendants in getting Killey to agree to a re-valuation of his assets in order to attempt to defeat the plaintiff's claim, shewed that they were quite willing to act dishonestly towards the plaintiff.

There are no merits in the defence, and it is only upon the technical ground that the plaintiff, not being a party to the deed of the 29th February, 1884, cannot enforce or cause it to be enforced for her benefit, that the defence is rested.

It may be that the plaintiff could not have maintained an action at law upon this deed, although for her benefit, because she was not a party to it; but I think that this is an instance in which the plaintiff is entitled to treat Killey, who exacted the stipulation in this deed, as her trustee, and through him to enforce it.

"Another class of implied trusts," says Story, "which may be mentioned under this head, is that which arises, under contract or otherwise, by operation of law, from a claim which may be directly enforced at law against one party, but to the due discharge of which another party is ultimately liable. In such a case a Court of Equity treats it as a trust by the party ultimately liable, which may be distinctly enforced by the party ultimately entitled to the benefit of it; in other words, a Court of Equity will make the party immediately liable who is, or may be at law, or in equity, made ultimately liable:" Equity Juris. sec. 1250.

In the case of *Gregory v. Williams*, 3 Mer. 582, one Parker, who was in possession of a farm belonging to the defendant Williams, was considerably indebted to Williams. He also owed a large debt to one Gregory. Parker, as Williams knew, was under apprehensions that Gregory would arrest him. Williams, the landlord, and Parker, the tenant, entered into an agreement in writing, to which Gregory, the creditor, was neither a party nor privy, to the following effect; namely, that if Parker would make over to Williams all his property and give up possession of his farms he would pay the debt due to Gregory. Gregory was subsequently informed of this arrangement, and he



and Parker filed the bill against Williams to enforce it if the property assigned by Parker to Williams had been sold at a loss. The Master of the Rolls, in giving judgment, said : " It is then said that supposing it is upon the first engagement that Mr. Gregory is to proceed they ought to have gone to law and to have recovered as upon an undertaking in writing to pay the debt of another person, inasmuch as such an undertaking is undoubtedly valid at law. Now it may be a doubt whether they could have recovered at law upon this agreement, for the engagement is not made directly to Gregory ; it is made to Parker only, and the consideration is furnished by Parker, for it is Parker alone that does the acts which constitute the consideration for the agreement. Gregory himself furnishes no part of the consideration, and he is no party to the contract. Parker acts as his trustee, and Gregory may derive an equitable right through the medium of Parker's agreement, but I think it would be at least questionable whether he could have maintained an action at law. It seems to me like the case (*Tomlinson v. Gill*, Ambler 330,) where a person promised the wife of an intestate that if she would let his name be used in the administration he would make up the deficiency of assets to pay the intestate's debts. Lord Hardwicke said that that was an engagement which could be made good only in a Court of Equity, for that it was not made to the creditors ; that they could claim only through the wife, but that they were entitled to the performance of a promise made to her, because it was to be considered as made to her in trust for them. So here Gregory has a right to insist upon the benefit of the promise made to Parker."

These cases, *Gregory v. Williams* and *Tomlinson v. Gill*, have been frequently quoted with approval. See *Lloyds v. Harper*, 16 Ch. D. 290. It is true that in *re Empress Engineering Co.*, 16 Ch. D. 125, Jessel, M. R. said : " I am far from saying that there may not be agreements (between A and B) which may make C a *cestui qui trust*. There may be an agreement like that in *Greg-*

*ory v. Williams*, where the agreement was to pay out of property, and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party."

But the agreement in *Gregory v. Williams* was not to pay "out of the property," but to pay generally. The bill, it is true, alleged the agreement to be to pay out of the proceeds of the property, but the writing which established the agreement did not provide for payment out of the proceeds of the property, but for payment generally.

If Killey is to be taken to be in this case a trustee for the plaintiff, then he is properly before the Court; for if he had refused to join as a plaintiff to enforce the deed for the plaintiff's benefit, and it is clear that he would have done so, he would have been properly made a defendant, and in *Gregory v. Williams* the Master of the Rolls was clearly of opinion that the right to enforce the agreement was in Gregory; and in *Tomlinson v. Gill* the bill was by the creditors alone.

These cases of *Gregory v. Williams* and *Tomlinson v. Gill* were followed in our Court of Chancery in *Mulholland v. Merriam*, 19 Gr. 288, and I think they must be held to govern this case.

This case is, however, much stronger for the plaintiff than the case of *Gregory v. Williams*, because here the co-partnership formed by the deed of 29th February, 1884, expressly recognized the plaintiff's right to payment by that co-partnership, paid her a part of her claim, and negotiated with her for an extension of time for the payment of the whole. These circumstances, if anything before were wanting, in my opinion clearly established the relationship of trustee and *cestui qui trust*, and entitled the plaintiff to maintain her action. See *Ellison v. Ellison*, 6 Ves. 656; *Synnot v. Simpson*, 5 H. L. 121.

I refer also to *Page v. Cox*, 10 Hare. 163; *Re Flavell*, 25 Ch. D. 89; *Lambe v. Vice*, 6 M. & W. 467; *Gandy v. Gandy*, 30 Ch. D. 57; *Gerow v. Clark*, 9 U. C. R. 219. In

my opinion the motion should be absolute for judgment against the defendants Osborne, with costs.

WILSON, C. J., and O'CONNOR, J., concurred.

*Judgment accordingly.*

---

[QUEEN'S BENCH DIVISION.]

BALLARD V. STOVER ET AL.

*Will—Construction—“Share and share alike”—“Survivors and survivor.”*  
*Devisees—Trustees or beneficiaries.*

A testator devised to four nephews and a grand-nephew, their heirs, executors, administrators, and assigns, all his real and personal property, share and share alike, upon trust that they, or the survivors or survivor of them, should out of the same “suitable and well” support his wife during her natural life in as comfortable a position as she was then in with him. He appointed his said four nephews executors of his will. The plaintiff and the defendants, the said devisees and the other defendants were all nephews and nieces of the testator and would have been entitled to share in the estate in case of the testator dying intestate. The testator's wife died before him.

*Held*, [ARMOUR, J., dissenting], that the devisees took the beneficial interest in the estate, real and personal, share and share alike.

*Per* ARMOUR, J. The creation of the trust in favour of the wife was the sole object of the devise and the testator never intended the devisees to take beneficially.

THIS was an action arising under the will of one Jacob Mosier Stover.

The plaintiff contended that the testator was of unsound mind at the time of the making of the will in question.

The case was tried before O'Connor, J., and a jury at the last Autumn Assizes at Woodstock, when the learned Judge withdrew this question from the jury, and found in favour of the testator's mental capacity, and gave judgment formally sustaining the defendants' contention in favour of the will.

December 2, 1886, *J. B. Clarke* moved against the finding and judgment of the learned Judge in this respect, and to enter judgment for the plaintiff, on the ground that Jacob M. Stover by his will (set out in the judgment below) devised to the defendants William Stover, Ephraim Stover, Adam J. Stover, and William F. Jacob, and Jacob Stover an estate in trust only for the benefit of Mary Stover, his wife, during the term of her natural life, and the said wife of the said Jacob M. Stover having died in the year 1881, three years before the death of the testator, a lapse took place, and the said William Stover, Ephraim Stover, Adam J. Stover, William F. Jacob, and Jacob Stover took no interest in the property of the said Jacob M. Stover under the said will, but held the said property as trustees for the heirs and heiresses at law of the said Jacob M. Stover, deceased.

*Osler*, Q.C., shewed cause.

June 28, 1887. ARMOUR, J.—[After sustaining the finding of the learned Judge at the trial.] The next question is, upon the construction of the will, whether the devisees took beneficially or whether there is a resulting trust in favour of the heirs at law and next of kin.

The words of the will are : "I will devise and bequeath unto William Stover and Ephraim Stover, sons of my brother, William Stover ; and to Adam J. Stover, son of my brother, John Stover ; and to William Francis Jacob, son of my sister, Matilda Jacob, wife of William Jacob ; and to Jacob Stover, son of my nephew, William Stover, all of the township of Norwich, in the County of Oxford, their heirs, executors, administrators, and assigns forever, all my real and personal property, share and share alike, upon trust that they, or the survivors, or survivor of them, or the heirs, executors, administrators, or assigns of the survivors, or survivor of them, shall out of the said real and personal estate, suitable and well support Mary Stover, my present wife, in as comfortable a position and manner of living as she now has with me, for and during her natura



life. And I hereby nominate, constitute, and appoint the aforesaid William Stover, Ephraim Stover, Adam J. Stover, and William Francis Jacob, executors of this my last will and testament."

Mary Stover, his wife, died before the death of the testator.

In *King v. Denison*, 1 V. & B. 272, Lord Eldon thus laid down the rule governing cases like the present: "If I give to A., and his heirs, all my real estate, charged with my debts, that is a devise for a particular purpose, but not for that purpose only; if the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just this difference; the former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, *subject* to a particular purpose; the latter is a devise *for* a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal estate is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him." See also 16 East 283.

In *Williams v. Arkle*, L. R. 7 E. & I. Appeals 606, Lord Chancellor Cairns says: "It is an undoubted principle of construction that where you find property given to one individual or more and a trust is declared of a part, or a trust is declared which does not exhaust the whole of the property, there the creation of the trust is considered to be the sole object of the gift, and that which is unconsumed by the trust results to the representative of the donor."

Now, applying the rule as laid down by Lord Eldon to the will in question, we have in this will the whole legal estate "given for the purpose of satisfying trusts expressed,

and those trusts do not in their execution exhaust the whole: so much of the beneficial interest as is not exhausted," belongs, therefore, to the heirs at law and next of kin according to the respective qualities of the property devised.

Or, applying the rule as laid down by Lord Cairns, we find by the will in question property given to five individuals, and a trust is declared which does not exhaust the whole of the property, and, therefore, the creation of the trust must be considered to be the sole object of the gift, and that which is unconsumed by the trust must result to the representative of the donor.

All the words of the will in question down to the words "share and share alike" are equally applicable to the devisees taking in trust only as to their taking beneficially. Then come the words "share and share alike," on which alone any argument can be founded that the devisees are to take beneficially. It is true that these words are indicative of a tenancy in common, but they are not necessarily to be so construed if the context is against such a construction, and I think it is so here. See *Doe v. Abey*, 1 M. & S. 428; *Fielden v. Ashworth*, L. R. 20 Eq. 410. A trust may, however, be declared of a tenancy in common as well as of a joint tenancy, and immediately after these words come the words "upon trust," clearly shewing that the devisees are to take in trust, and not beneficially.

It is impossible to give the words "upon trust" any other than their technical meaning, especially as this will was drawn by a counsel learned in the law, who would never dream of using such words except in their technical sense. Then come the words, "that they or the survivors, or survivor of them," clearly indicating a joint tenancy, "or the heirs, executors, administrators, or assigns of the survivors or survivor of them, shall out of the said real and personal estate suitably and well support Mary Stover, my present wife, in as comfortable a position and manner of living as she now has with me for and during her natural life." Now, how could the survivor out of the real

and personal estate suitable and well support &c., unless "the said real and personal estate" devolved upon such survivor? If the learned counsel had been instructed to give the devisees a beneficial interest he would no doubt have done so, and would have used apt words for that purpose.

It is clear to my mind that the creation of this trust was the sole object of the devise, and that the testator never intended that the devisees should take beneficially.

Courts in former days, when the law made an unjust disposition of the property of an intestate, strove hard to maintain a will going so far, in some instances, as to make it what it was not; but now in this country, at all events, the law makes a just disposition of an intestate's property, and there is no reason why Courts should give an effect to a will of which the best that can be said of it is that the testator might have intended it.

I refer also to *Fowler v. Garlike*, 1 Russ. & M. 232; *Williams on Exors.*, 5th ed., p. 1327, and the cases cited in notes *u*, *v*, *x*, and *y*.

In my opinion the devisees in the will must be declared trustees of the property which passed to them under the said will for the heirs at law and next of kin of the testator, according to the respective qualities of the said property.

As to the costs, I cannot say that the plaintiff had not reasonable ground for investigating the testamentary capacity of the testator at the time he made this will. She has failed in establishing want of testamentary capacity, but she has succeeded as to the construction of the will. I think that on the whole, therefore, the proper order to make would be that the costs of all parties in this suit should be paid out of the estate.

I refer to *Macaulay v. Kemp*, 27 Gr. 442: *Boughton v. Knight*, L. R. 3 P. & D. 64.

WILSON, C.J.—The devise and bequest of "all my real and personal property" are made to four of the testator's

nephews, describing each one of them as son of his, the testator's, brother or sister as the case may be, and to a grand-nephew, describing him also, "their heirs, executors, administrators, and assigns for ever, share and share alike, consisting chiefly of mortgages, upon trust that they or the survivors or survivor of them, or the heirs, executors, administrators or assigns of the survivors or survivor of them, shall out of the said real and personal estate suitably and well support Mary Stover, my present wife, in as comfortable a position and manner of living as she now has with me for and during her life."

The question is, what do these words import, and what is their interpretation, aided by the state of the testator's family and by other matters which may be considered when it is sought to raise or to defeat a resulting trust?

That there is a resulting trust is a presumption of law when no trusts are declared at all, or in part only. See *Lewin on Trusts*, 8th ed., 147; and that parol evidence is admissible see *Fowkes v. Pascoe*, L. R. 10 Ch. 343.

1. The devise and bequest are to four of the nephews and a grand nephew of the testator, the nearest blood relations he had, although not the whole of those of the same degree.

2. The devise and bequest are to five persons, and what for? Upon trust for the testator's wife, who was an old woman at the making of the will, and insane, and whose life could not, in all probability, last more than a few years; and who had been kept by her husband in clothing and in food, in a very mean and insufficient manner, the whole cost of her living probably not exceeding \$100 a year, if indeed it cost one-half of that sum in actual outlay, and who was to be kept by the five trustees "out of his real and personal estate suitable and well, in as comfortable a position and manner of living as she now has with me," that estate consisting chiefly of mortgages amounting to at least \$40,000—a productive estate—and yielding probably about \$2,400 a year.



It seems strange that so many trustees should have been appointed for so small a purpose—to support so old a woman, and for the short duration of her life—she died, in fact, in September, 1881, in less than four years from the making of the will, and three years before the testator—and to lay out only enough to keep her, and to provide a fund so enormously beyond the requirement of it, if no more was to be done with that estate than simply to keep this old woman.

3. If the testator's wife had survived the testator, say for ten years, what was to be done with the annual surplus of about \$2,400 a year, after providing for the widow? Was that surplus to be placed on investment accumulating till the widow's death, and then with the principal fund to result to the general estate?

These are all reasons why so unlikely and unnecessary a provision should have been made for the widow alone, without any beneficial interest passing to those expressly named in the will, who are among his nearest of kin; and how improbable it is that all that should be held to have been the purpose and intent of the testator, by implication only.

4. The devise and bequest to the five persons named, share and share alike, raises a strong presumption of the beneficial interest passing to these persons—not strangers, but his nearest kin.

5. It is said that these last named words should not be much relied upon against the general claimants, because the succeeding words, "upon trust," are an express declaration against there being any estate besides a mere trust estate conferred upon the persons named. That is no doubt an argument of great force, and the only one which can be much relied upon against the passing of the beneficial interest.

6. It is said also that these persons, "or the survivors of them, or the heirs, executors, administrators or assigns of the survivors or survivor of them, shall" provide for the wife of the testator; and that the five named persons cannot

take share and share alike, unless the shares of those who die pass upon such death to the representatives of those who die in the life time of the widow ; and if that is the case the widow might, if she had survived, have been left at last to be supported by the one survivor, or his heirs, executors, administrators or assigns, so that the longer she lived the more would the fund for her provision run the chance of being cut down.

It is barely possible the testator may have intended that, if it can be said he had any intention about it, for even then there would be a very sufficient fund remaining for the trust which was charged upon it.

7. The word "assigns" has also a signification, for a trust estate is not assignable at the will of the trustees.

8. Then it may be said that if the estate is to be kept entire until the expiration of the trust, the five persons cannot take "share and share alike" if one or more of them die during the life-time of the widow, and so these words lose all their supposed operation of indicating that a beneficial interest passed by virtue of them.

9. The will then declares that the five persons "and the survivors or survivor of them, &c.," are to provide for the testator's wife "out of the said real and personal estate \* \* for and during her life," shewing, it is said, that the estate is to be kept as one and entire and indivisible fund, and not distributed in any manner among the trustees or representatives of any of them who may die before the trusts are fulfilled. And so the five named persons are not to take "share and share alike," but "the survivors and survivor of them, or their heirs, &c.," are to take the whole estate, real and personal, and execute the trust, which shews, it is said, it is a trust which alone is created, otherwise the representatives of the five who happened to die before the fulfilment of the trust would lose the shares of those they represented ; and it is plainly not the intent of the will that some one or more of the five only who survive the trust shall take, and not the representatives of those who may have died.

No doubt there is confusion in the wording of the will, and a difficulty in interpreting it according to its literal language. All we can do is to give such effect to it as it will reasonably and properly bear, and my reading of it is that the five named persons take absolutely under the will; that the estate is not to be divided so long as the trust continues, for the widow is to be supported out of the said real and personal estate; that is, the whole of it, by all the trustees, if they are living, and by the survivors or survivor of them, &c.; and upon the death of the testator's wife that the estate shall go beneficially to the five named persons, share and share alike, or to the heirs, executors, administrators, or assigns of those who may have died from and after the will came into operation.

I refer to the following cases on the subject, a subject which depends upon the facts of each particular case, and in which it must be difficult and arbitrary to make the one a guide or a precedent for another. There are, however, some rules which apply to and must be considered in every case of the kind.

If a devise and bequest of all the testator's estate and effects be made to trustees, their heirs, executors, and administrators, upon trust to convert the personalty and to invest the money for the benefit of the widow and others, making no express disposition of the real estate, Held, the trust was only as to the personalty, but the beneficial interest in the realty was undisposed of by the will, and consequently resulted to the heir of the testator: *Longley v. Longley*, L. R. 13 Eq. 133.

Where the husband settled his real estate upon his wife on marriage, reserving power to her and to himself to do what they liked with the estate. They mortgaged it, with power of sale to the mortgagee, with a declaration that if the property or any part of it was sold under the power the mortgagee should, after paying the debt and charges, pay over the surplus (if any) to the husband, his heirs, executors, administrators or assigns. There were full trusts for the benefit of the wife and

children as to the realty, but no express provision was made as to any trust of personalty, and Fry, J., refused to declare that such a trust should be created, as the husband and wife had absolute power to do with the estate as they pleased, and he held there was no resulting trust as to the surplus of the mortgage debt. "In one word," he said, "it appears to me that a resulting trust is to be implied where it appears the taker is not intended to take beneficially. In this case there does not appear to me to be such an intention, and therefore I hold there is no resulting trust." See, also, *Jones v. Davies*, 8 Ch. D. 205. In this case the learned Judge also said, at p. 212: "As a general rule deeds" [and I think I may say on such a point, wills also,] "ought to be held to operate according to their express language. The express language of this deed is, that the money shall be paid to John Davies, the husband."

In *Lewin* on Trusts, 6th ed., p.146, it is said: "No positive rule can be laid down to determine in what cases the devise will carry with it a beneficial character, and in what it will be construed a trust; but on all occasions the Court, refusing to be governed by the mere technical phraseology, extracts the probable intention of the settlor from the general scope of the instrument," referring to several cases.

In *Hill v. Bishop of London*, 1 Atk., at p. 620, the devise was to G. S., willing and desiring her to sell and dispose of the subject of devise to Eton College, and on their refusal to Trinity College, and on their refusal to any of the colleges in Oxford or Cambridge, which will be the best purchaser." Held, not a resulting trust, but that G. S. took beneficially.

The Lord Chancellor said: "The general rule, where lands are devised for a particular purpose, that what remains after that particular purpose is satisfied, results, admits of several exceptions. If J. S. devise lands to A. to sell them to B., for the particular advantage of B., that advantage is the only purpose to be served according to the intent of the testator, and to be satisfied by the mere



act of selling, let the money go where it will ; yet there is no precedent of a resulting trust in such a case ; nor is there any warrant from the words, or intent of the testator, to say this devise severs the beneficial interest, but is only an injunction on the devisee to enjoy the thing devised in a particular manner \* \* So that the devise here amounts to no more than this : the testator gives the advowson to G. S., but if such or such a college will buy it, then he lays an injunction upon her to sell, and therefore there are two objects of the testator's benevolence—Grace Smith and the colleges." Several cases are then cited, and the Lord Chancellor concludes : " No general rule is to be laid down, unless where real estate is devised to be sold for payment of debts, and no more is said, then it is clearly a resulting trust ; but if any particular reason occurs why the testator should intend a beneficial interest to the devisee, there are no precedents to warrant the Court to say it shall not be a beneficial interest."

One of the cases there cited is *Coningham v. Mellish*, Prec. in Ch. 31, where it is said : "The words, in trust, were used, it being a devise of lands to his cousin A., and his heirs, in trust, to be sold for payment of his debts and legacies, and the surplus held to be no resulting trust for the heir." In *Walton v. Walton*, 14 Ves., at p. 322, the Master of Rolls said : " Some implication arises that it is only for the purpose of that agreement " [the marriage settlement of his daughter with the devisee] " that the property was given ; but it is impossible to say that is a necessary, though it may be a probable, inference." And parol evidence may be given to prove the legal title of the executor, or devisee to the residue : *Id.* p. 322.

The statement of Lord Chancellor Eldon, in 1 V. & B., at p. 27, is this : "Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir ; but where the whole legal interest is given for a particular purpose, with an intention to give

to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him."

In *Rogers v. Rogers*, For. 268, by will the testator gave a legacy of £5 to B., his brother and heir. Then he constituted his beloved wife whole and sole heiress and executor of all his lands, tenements, goods, and chattels whatsoever, real and personal, the same to sell and dispose of as she should think proper, to pay his debts and legacies. Held, the devise "being to a wife, whom the husband mentioned with affection, it is impossible to imagine he intended to give the land away from her, and make her a trustee for his heir. She is also to sell and dispose of the estate as she thinks proper. By making her heiress he has put her in the room of the heir; besides, the real and personal estate are mixed together, and if there be a resulting trust of the one, there must be of the other, which was never pretended where the executor had no legacy or was not cut off by some express words."

In *Cook v. Duckenfield*, 2 Atk., at p. 566, a case of *Floyd v. Spillet* is mentioned, in which it is said it is a circumstance that the parties claiming the beneficial interest are "very near relations—a wife and children—and in all such cases inferences of bounty have been drawn, and consequently rebut any equity the heir at law might have of a resulting trust."

In *Smith d. of Denison v. King*, 16 East 283, devise of all testator's real estate to her cousins M. A. and A. I., who were women, their heirs and assigns for ever, subject (inter alia) to certain annuities, one to her brother A., her heir at law, and another to her sister S. and their children for life; and the estate was charged therewith, and the surplus profits were to go to A. for life, remainder to his children for life, remainder to S. for life, remainder to the surviving children of her brothers and sisters for life, but gave no directions as to the remainder in fee: Held, that M. A. and A. I. took the remainder to their own use, al-

though they also had legacies under the will, and there was no resulting trust to the heir at law.

It was argued there could be no object in making women trustees if it were not intended to give them a beneficial interest. So, also, the fact that they were described as the cousins of the testatrix was entitled to some weight: *Coningham v. Mellish*, Prec. in Ch. 31; *Hobart v. The Countess of Suffolk*, 2 Vern. 644; and also the fact that the brother, who was heir at law, took express benefit under the will.

It was argued for the defendant that the devise to the cousins was "to them as joint tenants," which is the usual mode of devising a trust estate, but not such as is intended for the benefit of the devisees themselves. Lord Ellenborough remarked as to the relationship, "they were certainly better objects of bounty than of trust." The Court held no trusts were created by the will, that the remainder was subject to the specific charges.

In *Cook v. Hutchinson*, 1 Keen 42, at p. 51, the settlement was made by the father for the benefit of himself for life, and for his wife and children. The conveyance was to the son upon the trusts created. No trust was declared as to the surplus: Held, the surplus did not go to the grantor.

The Master of the Rolls said, considering the relation between the parties and the object and purport of the instrument, the father intended to part with all beneficial interest in the property, and he meant his son to have the benefit of that part of the property of which the trusts are not expressly declared. The son also took possession of the property, and supported his father for fifteen years, and his mother and cousin also.

If a conveyance be made to a stranger in blood, and no intention appears of conferring the beneficial interest, as the law will not suppose a person to part with his property without some inducement thereto, a trust of the whole estate will result to the settlor. But if the conveyance be to the wife or son it will be considered an advancement: *Lewin on Trusts*, 6th ed., p. 127.

The late case as to the advancement or resulting trust where the donee was a godson of the donor, and where the gift was sustained, refers to the cases upon that subject, and shews that the fact of relationship or the taking a special interest in the donee has much to do in determining whether the gift is or is not a beneficial interest or a resulting trust: *Standing v. Bowring*, 31 Ch. D. 282 C. A. The cases of *George v. Howard*, 7 Pr 646, and *Re Curteis's Trusts*, L. R. 14 Eq. 217, may be referred to.

The construction of the instrument is one means by which the intent of the grantor or testator may be ascertained, and if there be a resulting trust by the form of the written instrument that trust will not be permitted to be defeated by extrinsic evidence: *Langham v. Sanford*, 17 Ves. 443, 19 Ves. 641.

In *Bird v. Harris*, L. R. 9 Eq. 204, the will was construed as not giving the executors a beneficial interest.

The title of an executor to personalty, not otherwise disposed of, does not arise by gift of the testator, but by operation of law and as incident to his office: *Mapp v. Elcock*, 2 Ph., at p. 796.

In this last case the devise was to Elcock, his heirs, executors, administrators, and assigns, of all the real and personal estate of the testator, "to and for the several uses, intents, and purposes following," and in other parts of the will the estate is described as held upon trust, and that clearly is a gift of the whole property in trust, though the trusts declared do not exhaust the whole: Per Lord Cottingham, C., at pp. 799, 800; and the executor, therefore, was held not to be entitled to the beneficial interest in the surplus, for if any interest accrues to the executor it is not by way of gift but as incident to his office: Affirmed 3 H. L. 492.

The words "upon trust," it is said, may be strong evidence of the intention not to confer on the devisee a beneficial interest; yet that construction may be negatived by the context or by the general scope of the instrument: *Lewin on Trusts*, 6th ed., p. 131. See *Hill v. Bishop of*



*London*, 1 Atk., at p. 620. There *Coningham v. Mellish*, Prec. in Ch. 31, is referred to, where, though the words were "in trust," it was yet held there was no resulting trust.

In *Hobart v. Countess of Suffolk*, 2 Vern. 644, the devise was to three named persons and their heirs, upon trust; the remainder in fee was not settled by the trust: Held, that Gorge, one of the three devisees, being no relation to the testator, it could not be intended a provision or bounty for him, as it might have been to Colchester alone [Colchester being one of the three devisees; the third devisee is not referred to]. In note 4 of the case it is stated also that "the Court being of opinion the testator did not intend the trustees should have the fee against the testator's own right heirs at law, and therefore that the same should be limited to them" [the heirs] "as a resulting trust."

In *Hughes v. Evans*, 13 Sim. 496, the devise was of all the testator's freehold estates to his most dutiful and respectful nephew, E., "upon the trusts and for the uses following"; but he did not declare any trusts except as to one of his estates: Held, there was no resulting trust to the son and heir at law, "from the context of the will and a codicil thereto."

The will referred to his son. "I leave that most undutiful son unprovided for, for his most infamous conduct to me upon all occasions;" and the codicil expressed his determination that "my son is never to enjoy one acre of my real estate": and he leaves the son a guinea a week for his maintenance, and £20 a year for his clothing. His son was, at the time of making the will, in a lunatic asylum. There was no reason in that case to declare a resulting trust.

In *Saltmarshe v. Barrett*, 29 Beav. 474, S. C. 7 Jur. N. S. 813, the testator gave legacies to his executors, and then all his residuary estate to the executors absolutely, charging portions of it with certain payments; then directed accumulation of part of it; gave power to vary the investments; indemnified them against loss, except from wilful

default, and provided for payment of their costs : Held, the executors took, as trustees, for the next of kin.

*Turner*, L. J., at p. 814 of the report in the Jurist said : "The gift to these persons is in joint tenancy, which is indicative of a trust." Gift by testator "of all my personal estate to my grandson, his executors, administrators, and assigns, subject to the payment of debts, legacies, and to the trusts hereinafter contained, upon trust to convert and to stand possessed of the said trust moneys." The trusts did not exhaust the funds. The grandson was appointed executor : Held, the grandson took beneficially under the terms of the whole will : *Clarke v. Hilton*, L. R. 2 Eq. 810.

In *Irvine v. Sullivan*, L. R. 8 Eq. 673, the testator directed his executors to pay the moneys arising from the sale of his estate and effects, after payment of his debts, &c., to the plaintiff, and he gave and bequeathed to her "absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." The plaintiff made a list of what the testator wished her to do : Held, the plaintiff took beneficially.

The Vice-Chancellor said : "One can hardly conceive why she was selected as trustee if trust was the purpose the testator had in view. Then again, having regard to the admitted relationship between the testator and the plaintiff, they being engaged to be married, which is a thing to be looked at in construing a will, she, the plaintiff, was a person to whom he had some motives of bounty. It is difficult to believe he merely meant to make her a bare trustee without giving her any beneficial interest whatever." *Williams v. Arkle*. L. R. 7 H. L. 606.

Whether there is a resulting trust or not depends upon the terms of or upon the intention to be inferred from the instrument. As a general rule the instrument is to operate according to the express language. If there is a devise for a particular purpose what remains after that purpose is satisfied, results. But if there is any reason why the testator should intend a beneficial interest to the devisee, that beneficial interest will pass. "In trust" or "upon trust" are not words conclusive of there being a resultant trust.

Partnership, or a social connection, or the fact of being a godson or goddaughter is a circumstance to be construed in determining whether a beneficial interest was intended or not, and the fact of relationship is referred to in many cases, and so late as in *Williams v. Arkle*, L.R. 7 H.L. p. 617.

The case of *Doe d. Borwell v. Abey*, 1 M. & Sel. 428, has, I think, no bearing upon this case adverse to the opinion I have expressed. It shews there may be a beneficial interest by survivorship in an estate of coparcenary, if so declared. So here there may be a joint estate to the five named persons in this will during the trust, and an estate in severalty, share and share alike, to them beneficially after the termination of the trust; and in my opinion that is the meaning and effect of the will, and the proper construction to place upon it by the light of the evidence.

No doubt that construction will disappoint all the expectants in the same degree of relationship with the beneficiaries, but that is the effect, intended or not, of most wills; and the testator was not bound to provide for all his relations; and it cannot be said, I think, from the evidence that he intended to die intestate as to this very large estate, excepting as to the pittance which he deducted from it, which was required for his wife's support for the few years of her life, which would be the effect of holding there is a resulting trust. The doctrine of not disinheriting the heir has not the same charm or potency now as in former times, nor when there are, as here, about a dozen nephews and nieces.

I am of opinion, therefore, the five named persons took on the death of the testator, who survived his wife, the beneficial interest in the estate, real and personal, of the testator, share and share alike, specifically given to them, out of a class of those who are the heirs-at-law of the testator.

O'CONNOR, J., concurred with WILSON, C. J.

*Judgment accordingly.*

## [QUEEN'S BENCH DIVISION.]

## THE CANADIAN LOCOMOTIVE CO. v. COPELAND ET AL.

*Bill of lading—Rate of freight—“ Danger of navigation excepted ”—Damage—Sale of cargo—Deductions.*

A schooner, carrying coal late in the autumn of 1883, from S. to K. was damaged by stress of weather. The cargo was unloaded to repair the vessel and the coal could not be delivered before the spring of 1884. The bill of lading stated the rate of freight to be \$1.50 a ton, but if the coal were not delivered in the season of 1883 the freight was to be at the going rates when the coal was delivered, “ the dangers of navigation, fire, and collision excepted.”

On the arrival of the schooner at K. the master tendered the coal to the consignees who refused to accept it, disclaiming all title thereto, and contending that the consignor or insurers must take it. The master, too, refused to deliver unless upon payment of a larger rate of freight than that then prevailing. After ten days delay the coal was, by consent of parties, unloaded on the consignees' wharf, they receiving it as wharfingers. It was afterwards sold by consent of parties and was purchased on behalf of the consignees.

*Held*, that the exception of the dangers of navigation did not apply to the rate of freight in any way, but to the safe delivery of the cargo, and that the defendants were only entitled to the rate of freight prevailing at the time of delivery.

*Held*, also, that the plaintiffs having repudiated the ownership and refused acceptance of the coal, the defendants were entitled to damages for the delay in unloading and also, in addition to the freight, to charges for unloading, selling, and delivering the coal.

THIS was an action tried last spring at Kingston before Cameron, C. J., without a jury.

There was no dispute as to the facts, the questions being of law only. The facts were that the plaintiffs bought in Sandusky, in the State of Ohio, a quantity of coal, stated in the bill of lading to be 591  $\frac{800}{1000}$  tons, in October, 1883, at \$2.35 a ton free on board, to be brought to Kingston. The defendants, the master and the four owners of the schooner “ Edward Blake,” received the coal to carry on the terms of \$1.50 a ton, but if the coal were not delivered in the season of 1883 the freight was to be at the going rates when the coal was delivered.

The vessel on her way to Port Colborne met with severe weather, and was very badly injured. She was taken in tow there by a tug, and, as the master said, “ the tug let



go of us, the cable slipped, and we went through one of the abutments of the pier, and on to the beach."

Q. "Was it stress of weather?"

A. "Yes; well, negligence on the tug's part in not making the line well fast, that was the principal cause."

The vessel got through the canal that season, but had to unload the cargo of coal at Port Dalhousie, and go into dry dock at St. Catharines for repairs.

The coal did not arrive in Kingston by the schooner, which was repaired that winter, until 28th April, 1884. The master notified Mr. Harty, the plaintiff's managing director, of his arrival that day. Mr. Harty stated in his evidence: "I said we would not accept the coal. Afterwards, about the 2nd or 3rd of May, I told the captain I would advance him the going rate of the freight at \$1.20 a ton, and allow him to put the coal on our wharf. I had got that rate by telegraphing to Gosling & Barber at Sandusky, who had shipped the coal" [The going rate was admitted to be \$1.20]. "The captain said he would not accept less than \$1.50. The bill of lading called for that. Some days later, that is, on the 7th of May, I was telephoned for to go to Mr. Kirkpatrick's office. I went and met several of the defendants. A document was then drawn and signed, by which I was to advance them \$1 a ton on the cargo, and allow them to discharge the coal on the wharf. The coal was unloaded, and I gave a receipt for it. I afterwards got a document, dated 15th May, notifying me the coal would be sold. I got another notice of sale, dated 10th June, and it was sold on the 17th of June. It sold for \$2.60 a ton in bond; the duty was paid by the purchaser. I bought it. The weight was  $594 \frac{480}{2000}$  tons. I paid \$1545, less the advances I had made. I received an adjustment of loss in October, 1885, and I had no notice or knowledge of any proceedings taken relating to the adjustment."

*Cross-examination*—"I declined at first to receive the coal, as I was advised it belonged to Gosling & Barber, and I settled with them in August, 1884, as I was advised to settle it. I offered the \$1.20 freight, and afterwards to

give the advance of \$1 a ton, and to have it docked to save demurrage." [The entire correspondence was by consent put in relating to this matter.] "We treated the cargo as if it had been abandoned to the insurance company. Gosling & Barber had telegraphed us, 'Neither you nor we have anything to do with the cargo; it is the property of the vessel owners.' We never had any notice of any adjustment being made. We always held the coal could have been delivered in the fall of 1883 by chartering another vessel. The coal was to have been delivered free alongside of our dock. We always unload the cargoes; the schooner was only to carry, not to load or unload. We were not in a position till the 15th of August, 1884, to accept the coal by reason of our correspondence with our consignor. I bought this coal when it was sold, but not for the company, in my individual capacity. By the company's charter they could not do such a thing, and to stand in such a position that there could be no action taken against the company by the consignors. The company got the coal from me. I was acting under legal advice. The company's money paid the consignors, and their money was advanced to me for that purpose, and I am charged with it, and I made no money out of it."

Reply :

"If the \$1.20 had been taken when I offered it the demurrage would have been saved."

That was the whole of the evidence for the plaintiff. The accounts are stated, shewing also the manner in which the Chief Justice disposed of them.

The Chief Justice allowed the account as follows :

Freight at \$1.20 .....	\$713 10
General average .....	155 77

The defendants were claiming as follows :

Freight on 594 480-2000 tons of coal at \$1.50....	\$891 35
Interest on freight.....	6 75
Cargo's share on general average .....	177 92
Charges made, special average on cargo, defendants' adjuster.	

1. Wharfage on plaintiff's wharf, two months at 10 cents a ton per month .....	\$118 88
2. Cost of unloading vessel.....	118 28
3. Legal charges.	73 49
4. Master's attendance at sale ..	10 90
5. Auctioneer....	10 00
Telegrams .....	1 02

They add up at \$332 67	
Carried out at.....	\$331 67
Master's charges for weighing out cargo after sale and settling sale .....	104 00
Ten days demurrage at \$40 a day .....	400 00

	<u>\$868 87</u>
Deduct from same the balance in favour of plaintiffs .....	1301 09
Balance against defendants	<u>\$432 22</u>

The Chief Justice found the plaintiffs' account to be as follows :

The plaintiffs' account was as follows :

\$100 00	1884.	
488 00	May 10. Cash advanced to Master.....	\$100 00
3 40	" 14. Further advance.	488 00
	" 24. Repairs to anchor	3 50
	July 12. Interest on advance .....	6 75
	" Wharfage on plaintiff's wharf for two months at 10 cents a ton per month on 594 480-2000 tons	118 88
	" Cost of unloading vessel at plaintiff's wharf ....	118 28
	Balance on sale of coal, the price brought having been \$1545 .....	709 69
709 69		<u>709 69</u>
<u>\$1301 00</u>		<u>\$1545 00</u>

Less allowed to defendants as a credit on their account .....	868 87
Balance in favour of plaintiffs .....	<u>\$432 22</u>

The Chief Justice stated the accounts in a rather different manner, but producing the like result.

He began with the fund in hand, the sum the coal produced on sale 594- $\frac{480}{2000}$  tons, at \$2.60 a ton. . . . \$1,545.50 and he deducted the freight from it at \$1.20 a ton. 713.40

---

\$ 831.90

Then he deducted the following items in the plaintiffs' account :

	Interest . . . . .	\$ 6.75	
Making them repay or, rather account for these two charges which had before, as was held, been wrongly deducted by them.	Wharfage . . . .	118.88	
	Unloading ves'l	118.28	— 243.91
			<hr/>
			\$587.99

And lastly he deducted from this last sum the general average he found for the defendants.	155.77
	<hr/>
	\$432.22

And that left the general balance in favour of the plaintiffs, to which he added interest from the 17th June, 1884, till judgment.	71.71
	<hr/>

And he gave judgment for the plaintiffs for	\$503.93
---	----------

The plaintiffs had brought their action complaining of the sale of the coal as a conversion of it, and the Chief Justice was of opinion the evidence shewed that the sale made did amount to a conversion unless the defendants had the right of lien upon the coal in respect of their freight and average, or unless the sale was authorized by the plaintiffs; and he referred to the following authorities to shew there was in law no right of sale in respect of a lien: *Ewbank v. Nutting*, 7 C. B. 797; *Donald v. Suckling*, L. R. 1 Q. B. 585; *The Norway*, Moore's P. C. N. S. 245, 13 L. T. N. S. 50; *Llado v. Morgan*, 23 C. P. 517; *Legg v. Evans*, 6 M. & W. 36; and not even for a maritime lien, *Pothonier v. Dawson*, *Holts* N. P. C. 385.

He further was of opinion that the defendants were in fault here, for they demanded \$1.50 a ton for freight, in



place of \$1.20 ; and the master refused to give up the coal unless he was paid the larger sum, to which he was not entitled.

The plaintiffs were therefore, in his opinion, entitled to recover the value of the coal, which was in this case the price it sold at, less the defendants' just charges against the plaintiffs in respect of their lien for freight, or other proper claims.

The claim of \$400, made by the defendants for demurrage, was not allowed, because the defendants improperly demanded a higher rate of freight than they were entitled to under the bill of lading.

The claim for general average was allowed to the defendants, not at the sum of \$177.92, but at the sum of \$155.77.

The charges for special average were for acts done after the arrival of the vessel at her place of delivery ; and the learned Chief Justice decided the adjuster had nothing to do with such services, that they were matters of contract between the parties ; but the two chief items of these charges, \$118.88 and \$118.28, for payment of wharfage and for services in selling the coal, amounting together to \$237.16, were made as paid to the plaintiffs ; and they were disallowed to them, the defendants having no claim for them. The third item for legal expenses paid in and about the matter, amounting to \$73.49, and the charges for master's expenses, and auctioneer's charges of \$10, amounting together to \$21, made up nearly the whole special average charged of \$331.67 ; and some of these items were held allowable.

Re-loading the coal was held not an item of general average, and *Svendson v. Wallace*, 13 Q. B. D. 69, 10 App. Cas. 404 ; *Atwood v. Sellar*, 4 Q. B. D. 342, 5 Q. B. D. 286, were referred to.

Judgment was given for the plaintiffs.

Notice of motion was given by the defendants to set aside the judgment for the plaintiffs, and to enter it for

the defendants, on the ground that the plaintiffs refused absolutely to accept the coal in question and the coal was purposely sold, and the defendants were not guilty of a conversion of the same; and on the ground that the judgment was against law and evidence; or to reduce the amount of the judgment, as excessive and not supported by the evidence; and to enter judgment for the defendants on their counter claim.

In Easter Term last, *Osler*, Q. C., supported the motion.

On the argument it was said, if the defendants obtained judgment for any amount beyond the recovery of the plaintiffs, they would be satisfied that the case should be so disposed of. The principal sum found in favour of the plaintiffs was \$432.22, the interest added being \$71.71; and the defendants' counsel relied most strongly upon the two following items as more than sufficient to counterbalance the principal sum of \$432.22 found for the plaintiffs, and more than sufficient to counterbalance the interest added to it also, although the interest should not be added if the defendants' two items of claim were allowed to him.

These two items were:

The defendants said by the bill of lading they should have been allowed freight on the  $594\frac{480}{2600}$  tons at \$1.50 a ton, while they were only allowed the going rate of freight at the time of delivery—\$1.20; and the thirty cents extra freight would be \$178.25. The other item was the demurrage for 10 days, at \$40 a day, amounting to \$400.00

---

The amount of the items making..... \$578.25

The bill of lading was worded as follows:

“To be delivered in good order, upon paying the freight and charges as noted below, if cargo is delivered during the season of 188—. If not so delivered, then the freight to be paid at going rates when delivered.—[The dangers of navigation, fire, and collision excepted.]” And it was said the exception applied to the rate of freight as well as to

the mere delivery, and as the delay till the next season was by reason of the dangers of the navigation, the defendants were entitled to the full freight of \$1.50. It was also contended that the defendants were entitled to the demurrage, because the day the vessel arrived at Kingston the coal was tendered to the plaintiffs and they refused to take it, the agent of the plaintiffs saying they did not own the coal, because they said and believed the property in the coal was in the consignors at Sandusky, and not in them; and that the reason the Chief Justice did not allow the defendants that item was not a sufficient reason for disallowing it, the reason being that when the master tendered the coal to the plaintiff, he demanded the freight at the rate of \$1.50 a ton; and the Chief Justice decided the defendants were not entitled to more than \$1.20 a ton, the going rate of freight at that time.

*Britton*, Q.C., shewed cause. The defendants were guilty of a conversion of the coal, for they had no right to sell it, it was the plaintiffs' property. It is clear the defendants were not entitled to more than \$1.20 a ton, the then going rate of freight. The exception of the dangers of navigation, does not affect the freight in any way. The damage done to the schooner was not by reason of the dangers of navigation but by the negligence of the tug which had the schooner in tow: *The Xantho*, 11 P. D. 170. As to the demurrage, the defendants are not entitled to it because they would not deliver the coal until they were paid the freight of \$1.50 a ton, and that they were not entitled to ask. The defendants say the plaintiffs refused to take the coal, but if they did the master could have landed it and kept it under his own control for his lien, and he should not have kept it so long on board of his vessel as he did: *Mors Le Blanch v. Wilson*, L. R. 8 C. P. 227. The general average was allowed at \$155.77. None should have been allowed. It was an adjustment carried on between the owners of the ship and the insurer of it, to which the plaintiffs were not parties and of which they

had no notice, and it was made in a foreign port—Buffalo—and not at the place of destination: *Svendson v. Wallace*, 10 App. Cas. 415. See also *Attwood v. Sellar*, 5 Q. B. D. 286; *Svendson v. Wallace*, 13 Q. B. D. 69. If the master demand too large a sum for freight, and the demand be so made as to amount to an announcement that it would be useless to tender a smaller sum, as it would be refused, it is held that the excessive demand amounts to a dispensation of tender: *Re Norway*, 11 Jur. N. S. 892. If freight is not paid, the right is one of detention only: *Abbott on Shipping*, 11th ed., 238–333.

June 28, 1887. WILSON, C. J.—There were many points of nicety and interest touched upon in this case which we are not required to consider, for substantially the only questions between the parties are :

1. Whether the defendants are entitled to recover the difference on the freight between the \$1.20 paid to them and the \$1.50 they claim, or 30 cents a ton upon the measured quantity of coal of  $594\frac{48}{100}$  tons, making the sum of \$178.25.

2. Whether the defendants are entitled to the demurrage for 10 days at \$40 a day, making the sum of \$400.

As to the first item, there is no doubt by the terms of the bill of lading the defendants are entitled only to the smaller sum which was paid to them, because the larger sums were payable only upon the condition of the delivery of the coal being made in the season of 1883, the going rate at the time of delivery to be the freight, if the delivery was not made in 1883.

Now the coal was not delivered in 1883, and the going rate was \$1.20 at the time it was delivered in April, 1884. The exception of the dangers of the navigation, &c., does not apply to the rate of freight in any way, but to the safe and proper delivery of the cargo.

As to the demurrage, it should be allowed if the detention on board the schooner was occasioned by the wrongful act of the plaintiffs, but not if it were the wrongful act of the defen-



dants or of the master. It was the wrongful act of the plaintiffs if they refused to take a delivery of the coal and to pay the freight and other proper charges which were a lien upon the coal, and if the master could find no place to unload the coal and secure it and preserve his lien upon it for the freight and other proper charges without subjecting it to any other lien for storage or wharfage which would interfere with or supersede the lien of the master. It was the wrongful act of the defendants if, notwithstanding the plaintiffs' refusal to accept the coal or to pay the freight, the master could have landed the coal and still retained his lien upon it.

The evidence shews both the plaintiffs and the defendants were to blame ; the one in respect of the non-acceptance of the coal, and the other in respect of the demand of too high a rate of freight.

The evidence above set out shews that Mr. Harty, the manager of the plaintiffs' company, upon being notified by the master of the arrival of the schooner, with the coal, on the 28th of April, told the master the plaintiffs would not accept the coal ; and he said afterwards, on the 2nd or 3rd of May, he told him he would advance him the going freight of \$1.20 a ton, and allow him to put the coal on the company's wharf.

That first refusal was on the part of the plaintiffs to take the coal. Mr. Harty does not say the freight was mentioned that day. The master said expressly freight was not then mentioned. Mr. Harty said the master afterwards said he would not accept less than \$1.50 a ton, as that was what the bill of lading called for ; that was a wrongful act upon his part, for he was claiming more than he was entitled to. But even then the plaintiffs would not accept the coal as consignees, but only as wharfingers. They would not, however, pay even the \$1.20 a ton, but only the \$1 a ton on account.

The manager made no formal tender of the \$1.20 a ton as he should have done ; but that was afterwards excused, as the master said he would not take less than \$1.50 : *The Norway*, 11 Jur. N. S. 892.

The offer by Mr. Harty to allow the coal to be landed on the plaintiffs' wharf was not by way of acceptance of the coal, for they had by their manager disclaimed it, and the writing which was afterwards given by Mr. Harty of the 7th and 15th of May, allowing the coal to be landed on the wharf, states expressly he received it as a wharfinger, under charges for unloading, dockage, &c.; and he paid \$1 a ton upon the coal, but not by way of acceptance, and he paid it as for himself and not for the plaintiffs; and the plaintiffs did charge for wharfage. The defendants landed the coal, and in June they sold it to Mr. Harty, in effect to the plaintiffs, for \$1,545, and Mr. Harty, having to pay the price, deducted the wharfage, among other charges, from the proceeds; but the charge was not allowed to the plaintiffs at the trial.

The reason Mr. Harty gave for not accepting the coal was, he was under the impression the plaintiffs did not own it. They contended the property in it was in the consignors at Sandusky; and they maintained that contention until August, 1884, when they finally were advised to settle with the consignors, which they did. That was the reason Mr. Harty gave why he would not accept the coal for the plaintiffs when the master offered it in April; and that is the reason he, and not the plaintiffs, advanced the \$1 a ton upon the coal when it was landed, and why the charge was made for wharfage in favour of the plaintiffs; for at that time the plaintiffs had not determined to receive the coal as their own property, and they were keeping matters in such a state that they might be able to say to the consignors that they, the plaintiffs, had done nothing to treat the coal as theirs, in case it should turn out the coal was then in law the property of the consignors.

The plaintiffs, on being informed of the beaching of the schooner, telegraphed to the consignors enquiring if they, the plaintiffs, had anything to do with the coal, and the consignors answered that neither the plaintiffs nor the consignors had anything to do with it; it was the property

of the owners of the vessel. The refusal to take the coal was quite plainly not because the \$1.50 freight was asked, but because the plaintiffs and the consignors were disputing about the ownership of the coal, they both thinking the cargo had been cast upon the vessel owners by the accident to the vessel, or upon the underwriters of the coal, or upon one or other of these parties by the great, though unavoidable, delay. The plaintiffs were the wrongdoers in not accepting the coal upon the grounds they assigned for refusing to take it—that they were not the owners of it—and they maintained that position until August. When it was landed they took it only as wharfingers subject to their charge as wharfingers, which they exacted out of the proceeds of the sale. The master, according to the authorities, could not safely wharf it subject to charge without risking his own lien: *Mors Le Blanch v. Wilson*, L. R. 8 C. P. 227; *Barber v. Meyerstein*, L. R. 2 C. P. 38; and he was not obliged to unload it there, for it gave a lien, or rather, I should say, the plaintiffs asserted a right of lien upon the coal for such wharfage.

I think, upon the whole, the defendants are more entitled to lay the blame of the non-acceptance of the coal upon the plaintiffs, and the non-delivery of it in due time, because they refused it upon the ground of the coal not being their property, than the plaintiffs are to lay the blame upon the defendants; for it is quite manifest it was not the higher rate of freight being demanded by the master which was the cause of the plaintiffs' refusal, but because they deliberately, for their own purposes, rejected and repudiated the cargo altogether, and would not take it on any terms except as wharfingers at hire, according to their own declarations.

The sale that was made of the coal the plaintiffs cannot therefore object to, because they made no claim upon the coal, excepting as wharfingers; and their writings shew they held it subject to the master's order, and in truth they assented in that manner to the sale. It is true in August they changed their rights and character, but that

was after all this trouble and expense had been incurred, and they must now take their legal rights subject to the condition of things which they asserted existed at the earlier time, and which they forced upon the defendants, and suffered them, if they did not in effect compel them, to submit to.

If the demurrage, \$400, be deducted from the \$432.22 found for the plaintiffs, that will leave \$32.22 only against the defendants; and I think I should see if there are not other charges which may, under the circumstances, be properly found for the defendants. The defendants' counsel proposed to waive all further defence if the plaintiffs would abandon their demand, but the plaintiffs refused to do so. That cannot properly be submitted to the plaintiffs again, if the defendants are thought to be entitled to recover as much or more than will cover the remaining sum of \$32.22 as yet in favour of the plaintiffs. It appears to me that as the sale was made with the assent—I mean a plainly implied assent of the plaintiffs—who converted themselves into wharfingers, and who of their own accord held the coal subject to the master's order, and who did not and could not, in the character they assumed, forbid the sale, and who took the benefit of it, and expressly repudiated the coal as proprietors of it, that the defendants are entitled to charge for the master's time in attending to the sale and weighing the coal, the charge for which is \$104, and for unloading the coal \$118.28, and for the auctioneer \$10, and telegraphs \$1.02—\$11.02; total \$243.30. So that the account would stand as follows:

Amount found for the plaintiffs .....	\$432 22	
Demurrage .....	\$400 00	
Above items .....	243 30	
	<hr/>	643 30
Balance in favor of the defendants .....	\$211 08	

ARMOUR and O'CONNOR, JJ., concurred.

*Judgment accordingly.*



## [CHANCERY DIVISION.]

## RE KONKLE.

*Husband and wife—Conveyance of lands by wife without her husband joining.*

Where a woman, married in 1867 without marriage settlement, acquired lands in 1879, by deed of conveyance to her in fee simple absolute

*Held*, that she could convey the said lands to a purchaser without the concurrence of her husband.

THIS was an application under the Vendor and Purchaser Act.

The facts were as follows: Ann Konkle married Adam Konkle on May 5th, 1867, without marriage settlement. On May 18th, 1879, as the result of a certain action of alimony theretofore commenced by his wife, Adam Konkle conveyed the lands in question to Alexander Finkle in fee, and he re-conveyed the same to Ann Konkle on the same day. Ann Konkle had now contracted to sell the lands to William Tallman, who however raised the objection in these proceedings, wherein Ann Konkle was petitioner that she could not make a good deed to him without her husband joining which he declined to do.

No evidence was offered that the property was given to Mrs. Konkle as her separate estate.

The matter came on for argument on November 3rd, 1886.

*Murdoch*, for the vendor.

*McClive*, for the purchaser.

The following cases were cited: *Adams v. Loomis*, 24 Gr. 242; *Re Coulter v. Smith*, 8 O. R. 536; *Bryson v. The Ontario and Quebec R. W. Co.*, 8 O. R. 380; *Griffin v. Patterson*, 45 U. C. R. 536; *Reid v. Reid*, 31 Ch. D. 402; *Turnbull v. Forman*, 15 Q. B. D. 234; *The Married Woman's Property Act, 1884*: 40 Vic. ch. 7, (O.) Schedule A. clause, 156.

November 3rd, 1886. FERGUSON, J.—There will be judgment in favour of the petitioner, and a declaration that the vendor has the power to convey the lands in question without the concurrence of her husband in the conveyance. The petitioner will have the costs.

This case will not be carried to appeal.—REF.

---

[COMMON PLEAS DIVISION.]

ROSS V. WILLIAMSON.

*Evidence—Document—Loss of—Proof of contents.*

Where a party endeavours to prove by oral testimony the contents of a written document, the Court before giving effect to such testimony, should be convinced that all the terms have been proven. It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but he must set out the whole document so that the Court may be able to give effect to all its provisions, and that by testimony of the clearest nature. The document need not be set forth in evidence in its very words, but its exact sense and effect must be shewn.

THIS was an action brought by the plaintiff as surviving partner of the firm of J. A. McInnes & Co., to recover the balance of certain moneys furnished to the defendant to purchase grain with.

The defendant set up that by the terms of his agreement with the plaintiff's firm, he was entitled to a credit of 1c. per bushel for all barley cleaned; and half the profits made on the sale of the barley.

The case was tried before Rose, J., without a jury, at Woodstock, at the Spring Assizes of 1886.

*G. T. Blackstock and Walsh*, for the plaintiff.  
*Fletcher*, for the defendant.

The learned Judge reserved his decision, and afterwards delivered the following judgment :

February 26th, 1887. ROSE, J.—It is clear that the defendant obtained large sums of money from McInnes & Co., with which he was to buy grain for them. The receipts are similar to the following :

“Princeton, Nov. 5, 1880.

Received from J. A. McInnes & Co. \$500, to pay for grain bought for the said firm.

(Signed), G. F. WILLIAMSON.”

The amount of money thus received is not disputed. The account shews it to have been \$60,406.72. The first remittance was on the 10th June, 1880, and the last on the 6th February, 1885.

It lies upon the defendant to satisfactorily account for such moneys.

The plaintiff admits receipts of grain which have from time to time been credited to the defendant, amounting to \$59,914.43; and claims the balance of \$492.34 as due by the defendant; and claims interest on such balance.

The defendant does not dispute the accuracy of the credits, so far as they shew the amount of grain; but claims they should be increased by a credit of 1c. per bushel for all barley cleaned, and one-half the profits made on the sale of the barley.

It lies on the defendant to clearly establish such a claim, as it is disputed by the plaintiff, who says he never heard of it during McInnes's lifetime, and never acted upon it in the account kept with the transaction.

The defendant seeks to establish his claim by the testimony of several witnesses, who come forward to testify to the terms of an alleged written agreement which the defendant says he and McInnes entered into in duplicate, in the fall of the year 1880. One of the duplicates, he says, was burned at the time of the fire which consumed his mill; and the other, if it ever existed, which is denied,

should have been among the papers of the firm. Ross, the plaintiff, says he never saw or heard of such a document.

I think, when a party endeavours to prove by oral testimony the contents of a written document, the Court, before giving effect to such testimony should be convinced that *all* the terms have been proven. I do not think it sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim. He must do more; he must set out the whole instrument so that the Court may be able to give effect to all its provisions, and that by testimony of the clearest nature. I do not mean that the document must be set forth in evidence—in its very words—but the exact sense and effect of the document must be shewn.

That this, in most cases, will be a difficult, indeed an almost impossible task, is apparent; but such burden must be carried by him who asserts a written agreement, which he says has been destroyed, and the existence of which is denied by his opponent.

Assuming that an agreement in writing was entered into as alleged, I do not believe that the witnesses, whose evidence was given at the trial, could have remembered its terms for six years with sufficient accuracy to testify with any degree of certainty.

Moreover, the language of the witnesses seemed to me to have a similarity about it which caused me to think it not at all improbable that they had been tutored before going into the witness box.

That one man, even if deeply interested, without his memory being refreshed, could remember the terms of an agreement for five or six years, so as to be able fairly to repeat them all, would, I think, be something quite remarkable; but that six or seven persons—most of them having little or no interest in the matter, should so remember—is to my own mind quite incredible.

Apart entirely from an examination of the correspondence, I cannot bring myself to rely upon the evidence offered by the defendant to establish the terms of the



alleged agreement in writing ; and an examination of the correspondence does not lead me to change my view.

[The learned Judge then set out the correspondence, and after commenting on same and on the evidence, proceeded as follows:]

On the whole, I am unable to rely on the defendant's evidence. He exhibits himself in a very unfavorable light, and I must discredit him ; and unless the reading of the letters in fact corroborate his statements, and I think they do not, I see no evidence which I credit supporting his claim. As I recollect the evidence the claim in this action by the defendant was the first put forward by him since the commencement of the dealings between him and the firm.

There must be judgment for the plaintiff for the amount claimed, with interest from the date of service of the writ of summons, and costs.

---

## [COMMON PLEAS DIVISION.]

## WILSON V. RYKERT.

*Appropriation of payments—Statute of Limitations.*

Appropriation of payments are to be made (1) as the debtor directs at the time of payment. (2) When there is no direction by the debtor, as the creditor directs. (3) When neither makes any direction, then the law will apply it to the older debt, or as may be just.

The defendant was indebted to the plaintiff and gave him several promissory notes in payment, which fell due in 1871. The interest was paid up to August, 1878. The defendant thereafter paid in 1882, \$50, \$40 and \$100 and in 1883 \$100. The first two payments were specially appropriated by the defendant to the interest, and the others were unappropriated.

*Held*, that the payments must be applied to the interest due on all the notes, the effect of which was to take them out of the Statute of Limitations.

ACTION on six promissory notes, dated 6th January, 1870, two of which were payable twelve months after date, and the others payable eight, seven, five and four months respectively, after date, with interest. Three of the notes were for \$138.77, and one for \$101, \$101.14, and \$102, making in all, \$720.45.

By the statement of defence, the defendant set up that in 1882 an agreement was entered into by and between the defendant and one Charles A. Wilson, a brother of the plaintiff, and the then holder, or the duly authorized agent of the holder of the said notes, that the balance due thereupon should be satisfied and discharged upon the receipt of the said C. A. Wilson of the sum of \$360, which sum the defendant arranged to be advanced to him by a friend, and which the defendant was then unable to personally pay, as the said Wilson then well knew, and which sum the defendant subsequently procured and paid upon the terms of the said agreement and in satisfaction thereof: that prior to the said agreement and prior to the year 1879, the defendant made large payments upon the said notes to the lawful holder thereof.

In reply, the plaintiff set up that within six years before action commenced, the defendant made an acknowledgment in writing that the notes were unpaid and due to the plaintiff; and also an acknowledgment of his indebtedness, as aforesaid, by part payment on account of the interest then due on the said promissory notes.

The cause was tried before Cameron, C. J., and a jury, at Toronto, at the Summer Assizes of 1886.

It was admitted that the interest on the notes had been paid up to the 6th August, 1878.

According to the plaintiff's evidence, the following sums were paid: In 1882, to C. A. Wilson, the then holder, \$50 on July 13th; \$40 on September 26th; and \$100 by note at three months, which defendant took up at maturity. On September 30th, 1883, the defendant made another payment by giving Wilson a note for \$100, payable three months after date. Wilson said when this note came due he notified the defendant, who sent him a cheque for \$31.25. Wilson then went and saw defendant, who said a renewal note for \$70 should have been sent with the cheque, and that the defendant then gave him the note, which was afterwards taken up by the defendant. The plaintiff said the first two payments were expressly appropriated by the defendant on account of the interest.

The defendant stated that the debt for which the notes were paid was not a debt of his own, though one which he was responsible for: that in 1882 he was unable to pay the notes, and nothing could have been recovered from him. An agreement for a settlement was then entered into between him and C. A. Wilson, whereby C. A. Wilson agreed to accept fifty cents on the dollar on the amount of the principal of the notes in full of the said claim on the notes, making a sum of \$360; and all the payments were made under the settlement. He denied that the \$70 note was given to take up the \$100 note, but that he then paid Wilson \$70 in cash, which with the \$31.25 made up the amount of the note and discount; and that the \$70 note was given for the last payment under the agreement making up the \$360.

The learned Chief Justice, in his charge to the jury, inclined in favor of the defendant; and submitted certain questions to them.

The jury, in answer to the questions, found that there was no agreement for a settlement made between the defendant and Charles A. Wilson: that the payments made by the defendant in 1882, and since, were upon the notes sued on: that the cause of action accrued within six years next before the commencement of the action; and that the defendant within the six years made payments on account of the said notes, and the payments made in 1882, and since, amounted to \$290; and they found the amount unpaid in respect of the notes was \$808.

The learned Judge thereupon entered judgment for the plaintiff for \$808, with costs of suit.

In Michaelmas sittings, *Aylesworth* obtained an order *nisi* to set aside the verdict and judgment entered for the plaintiff, and for a new trial on the evidence and weight of evidence and on affidavits.

In Hilary sittings, February 16th, 1887, *Osler*, Q. C., and *Aylesworth* supported the order. The evidence shews there was a settlement, and that the money was paid under the settlement. The verdict is clearly against the evidence and the weight of evidence, and there must be a new trial. There should also be a new trial on the affidavits. There was no part payment to take the case out of the Statute of Limitations. The part payment must be such as to raise the presumption of a promise to pay the remainder. In *Morgan v. Rowlands*, L. R. 7 Q. B. 493, the payment of interest under compulsion of law was held not to take the principal out of the statute. The six notes here constituted separate debts, and there should have been an appropriation to each specific note. The case of *Burn v. Boulton*, 2 C. B. 476, shews that where there are two debts clear and undisputed, the case is not taken out of the Statute of Limitations as to either debt by evidence of a part payment within six years, not specifically appropriated to one



debt or the other. The appropriation should be to the earlier debt. See also *Warnman v. Kyman*, 1 Ex. 118; *Thompson v. Hudson*, L. R. 6 Ch. 320; *Hooper v. Keay*, 1 Q. B. D. 178. They further referred to *Ayer v. Hawkins*, 19 Vermont 26; *Worthington v. Grimsditch*, 7 Q. B. 479. The payments were made to C. A. Wilson and before the notes were assigned to the plaintiff. The payments were not endorsed on the notes. No appropriation could afterwards be made by the plaintiff.

*Masten, contra.* The finding of the jury on the question of the settlement is conclusive. Then, as to part payment. There is no question that in the case of a single debt the part payment would be sufficient to take the case out of the statute: *Boulton v. Burke*, 9 O. R. 80, 87. Here there was but one debt, though several notes were given for it; but even where there are several debts, it is a question for the jury whether the part payment is applicable to all; and it depends on the particular circumstances of each case, how the payments are to be applied. Wilson merely had the notes to collect in the plaintiff's absence, and the part payments were made for the plaintiff, who had the right to make the appropriation. Where there was an appropriation it was applied to the interest. The \$50 and \$40 were expressly so applied by the defendant. He referred to *Whitcomb v. Whiting*, 1 Sm. L. C., 7th ed., 648-650; *Nash v. Hodgson*, 1 Jur. N. S. 946; *Colter v. Thomson*, 27 L. J. N. S. Ex. 305; *Walker v. Butler*, 6 E. & B. 506; *Sibley v. Lumbert*, 30 Maine 253; *Ramsay v. Warner*, 97 Mass. 8; *Wood on Limitation of Actions*, pp. 237-8; *Cook v. Martin*, 29 Conn. 63; *Dean v. Hewitt*, 5 Wend. 257; *Howe v. Thompson*, 11 Maine 252; *Bird v. Adams*, 7 Georgia 505, 508; *Angell on Limitations*, 6th ed., 297; *McFadden v. Fortier*, 20 Ill. 509.

March 12, 1886. ROSE, J.—The claim is on six promissory notes falling due in 1871—the action being commenced in 1886. The Statute of Limitations would therefore be an answer to the action were it not that payments

were shewn to have been made within six years prior to the action.

The defendant seeks to avoid this result by setting up that they were made in payment of a sum of 50c. on the \$ of the original claim, under an agreement with the then holder to accept that sum in full of the claim, and being thus made were not in acknowledgment of the original debt or promise.

The jury found that no such compromise agreement was entered into.

If not, then unless some question as to the mode of appropriation can be successfully urged, the judgment must stand.

A new trial is asked for as to such finding on the weight of evidence, and on affidavits.

I have carefully examined the evidence to see if we could properly interfere on it alone.

[The learned Judge then set out the substance of the evidence and the affidavits, and came to the conclusion that he could not interfere, though he was also of opinion that had the verdict been for the defendant, it could not have been interfered with, and continued.]

Then the alleged agreement being out of the way, how are the payments to be appropriated?

The plaintiff sues on six promissory notes; the interest had been paid up to the 6th of August, 1878. In July, 1882, there was due for interest, computing the interest on \$416 at 6 per cent., and \$304 at 8 per cent., according to Mr. Masten's calculation, the sum of \$172.55.

According to the finding of the jury, the payments made thereafter were:

1st. On 13th July, 1882.....	\$ 50
2nd. On 26th September, 1882.....	40
3rd. On 30th November, 1882.....	100
4th. On 30th September, 1883.....	100

---

\$290

C. A. Wilson testified that payments one and two were made on account of interest. The third payment was unappropriated. As to the 4th there was the dispute as stated.

In *Wood* on Limitation of Actions, sec. 110, the rules as to appropriation are stated as follows: 1st, That a payment shall be applied as the debtor directed at the time of payment. 2nd, If the debtor does not apply the creditor may do so at any time before judgment. 3rd, If neither make the appropriation, the law will apply it to the older debt, *or as may be just*.

The cases are collected in the 8th Am. ed. of Sm. L. C., vol. i, pt. ii., p. 982, *et seq.* At p. 985, *Nash v. Hodgson*, in appeal, 6 DeG. M. & G. at p. 474, is referred to, in which the Lord Chancellor (Cranworth) said, at p. 482: "It appears to me that in this case that, there being three promissory notes, two barred and one not barred, and a payment made on account of interest generally, this payment must be attributed to the note which was not barred; and *if this were not so, the only effect would be to treat it as a payment on account of all,*" &c.

Applying these rules, the payments would be applied on all the notes and on the interest accrued thereon. It would be manifestly unjust to apply the payments on account of the principal of any note while overdue interest was unpaid on account of any other note. The debt was one—the several notes were given, no doubt, for the convenience of the defendant to spread the payments over different dates—but it was one transaction. When these payments were made none of the notes had been barred. All were overdue, and the interest had been running on all from the same date, the 6th of August, 1878. So far as appears one would judge the interest had been paid on all down to such date, treating the notes as representing in reality one debt.

I think the payments, whether any were appropriated or not, must be treated as payments on account of interest on all the notes, and so the Statute of Limitations affords no answer to the claim.

Mr. Osler asked to have corrected an error in calculating the interest on the notes, counsel not observing that only some of the notes bore interest at eight per cent., the others at six per cent., and by reason of such oversight the interest was allowed at eight per cent. on all the notes.

The judgment must be reduced by such sum as will remedy the error. Counsel can have the calculation made and hand it to the Registrar before taking out the order absolute.

The order *nisi* must be discharged, with costs.

CAMERON, C. J., and GALT, J., concurred.

*Order nisi discharged.*

---



## [COMMON PLEAS DIVISION.]

## COATES v. COATES.

*Contract—Statute of Frauds—Part performance — Staying of action—  
Specific performance.*

A brought an action against B. for the rents and profits of certain lands, which had belonged to their father who had died intestate, which lands B. had taken and held possession of for several years. On the action being entered for trial an agreement of settlement was arrived at, by which the action was to be stayed upon B.'s granting and releasing to A. his interest in the lands, and on B. undertaking to obtain certain releases, &c. B.'s counsel appeared in Court when the case was called for trial, and stated that it was settled, and an entry was made in the Court minute book, that the case was settled out of Court. Subsequently B. required A. to procure certain releases, and although these had not formed part of the settlement, A. agreed to do so, and at great trouble and expense procured the execution of same ready to be delivered to B. Certain of the releases to be procured by B. were to be executed by married women and infants which he was unable to procure. In an action to compel B. to carry out the settlement, B. set up as a defence the Statute of Frauds; and his inability to obtain the releases.

*Held*, [affirming the judgment of PROUDFOOT, J.,] that the staying of the action was a sufficient part performance to take the case out of the Statute of Frauds.

An option was given to A. to take a judgment for specific performance, with a reference as to compensation, if B. was unable to procure the releases; or a judgment for an account of the rents and profits, the subject of the former action.

THIS was an action tried before Proudfoot, J., at the Chancery Sittings at Cobourg.

The plaintiffs claimed a judgment ordering the defendant to execute and to procure to be executed certain deeds therein mentioned according to the terms of an agreement.

The learned Judge reserved his decision, and subsequently gave judgment as follows:

December 1, 1886. PROUDFOOT, J.—Francis Coates the elder died in 1866, intestate, seized in fee of the north-west quarter of lot 31 in the sixth concession of the township of Hamilton, in the county of Northumberland.

The plaintiffs and the defendant Richard Coates are all of the heirs and heiresses and next of kin of the intestate, except the widow and four children of Francis Coates the younger, a son of the intestate who himself died intestate.

The defendant soon after the death of the intestate entered into possession of that land, and for several years remained in possession receiving the rents and profits.

In September, 1884, the plaintiff William Coates, suing on behalf of himself and of all the other heirs and heiresses of the intestate, brought an action against the defendant claiming an account and to recover payment from the defendant of the rents and profits of that land for the time he was in possession of it.

Notice of trial in that action was given for the Cobourg Assizes, which commenced on the 3rd of November, 1884; and on the 31st October, 1884, an agreement of settlement of the action, and of all disputes and differences in respect of these matters between the parties was come to between the defendant and the plaintiff in that action, representing himself and his co-plaintiffs in the present action.

The terms and conditions of the agreement and settlement were that the defendant should grant and release to the now plaintiffs all his estate &c., in that land; and further that the defendant should procure a like release and quit claim in respect of the land to be executed to the plaintiffs by Richard Albert Coates, William Henry Coates, Ida Coates, and Melinda Coates, the four children, and by Ann Coates the widow of Francis Coates the younger; and further that the defendant should procure a release and bar of dower in the land to the plaintiff from Susan Coates the wife of the defendant, and by Ann Coates the widow of Francis Coates, the younger; and further that the defendant should procure a like release and bar of dower in the north half of the south half of lot No. 35 in the seventh concession of the township of Hamilton, to be executed to the plaintiff, William Coates, by the said Susan Coates and Ann Coates; and in consideration of the premises that the plaintiff William Coates should not proceed further with the action, and should bear and pay his own costs thereof, and pay to the defendant \$15 on account of his costs of defence.

In pursuance of that agreement the plaintiff William Coates by his counsel appeared at the Assizes when the action was called on for trial and stated to the Court that the same was settled, and an entry was made in the minute book that the case was "settled out of Court."

The plaintiffs caused the conveyances to be prepared for carrying out the agreement, and they were settled by the solicitor for the defendant.

While the solicitors for both parties were engaged in the preparation and settlement of these conveyances the defendant's solicitor, with the approval of the defendant, required that the plaintiff should execute to him, and to Richard Albert Coates, William Henry Coates, Ida Coates, and Melinda Coates, a release of all liability on account of the possession and occupation of the said north-west quarter of lot No. 31, in the sixth concession of Hamilton, and the receipt and enjoyment of the rents and profits of it, and of and from the said action; and, although this had not formed part of the settlement, yet the plaintiff agreed to the requisition, and at great trouble, expense and delay procured the same to be executed by all the parties ready to be delivered to the defendant.

The plaintiffs offer to pay to the defendant the \$15 on account of the costs of his defence of the said action.

The defendant refuses to perform the agreement, pleading, among other defences, the Statute of Frauds; and that two of the children of Francis Coates, the younger, are infants, and that he cannot procure them to execute the grant and release required.

The plaintiffs did not in their statement of claim, or reply, rely upon part performance as taking the agreement out of the Statute of Frauds; but I allowed an amendment for that purpose.

The terms of the original agreement, and of the subsequent requisition of the defendant, were clearly and distinctly proved by the solicitors for the plaintiffs and the defendant.

The defendant says he did not attend at the assizes as he thought the suit settled. He was examined, and while attempting to deny the agreement, in fact establishes it; and it is shewn that he was aware of the efforts of the plaintiffs to procure the execution of the release he required, and remarked to his solicitor, he thought the plaintiff, W. Coates, would have a difficulty in getting all the plaintiffs to sign; and, indeed, great difficulty was experienced and much expense and delay incurred in getting the release executed, as the plaintiffs were scattered over the American Union and Canada.

Notwithstanding the admissions of the defendant, and the clear evidence of the solicitors for the plaintiffs and defendant, as to the terms of the agreement, the defendant is at liberty to plead the Statute of Frauds, which in the present case enables him almost to perpetrate a fraud unless some act of part performance can be established.

The case of *O'Reilly v. Thompson*, 2 Cox 271, shews that on an agreement by parol, that upon the plaintiffs procuring a release of right from a stranger the defendant would convey, and the plaintiff accordingly procures the release by paying a valuable consideration, this is not a part performance of the agreement. So that, even had this condition formed a part of the original agreement, the performance of it would not have entitled the plaintiffs to specific performance of the agreement. If it would be of any use, as at present advised. I would be inclined to regard this requisition of the defendant, acceded to by the plaintiff, as incorporated in the original agreement; but I will assume, as the defendant insisted, that the whole agreement was that of the 31st October.

The only other ground for alleging part performance is the staying of the action for rent, &c.; and I think that this is such a part performance as excludes the operation of the Statute of Frauds.

It will have been noticed that by the terms of the agreement of the 31st October the execution, and procuring the execution, by the defendant and others of the



grants and releases mentioned in it, were the consideration for the plaintiff in that action not proceeding further with the action, and paying \$15 to the defendant.

The plaintiff has not proceeded further with the action, and caused to be entered on the minute book by the clerk of the Court what he stated to the Judge, that the action was settled out of Court, and has offered to pay the \$15.

The law upon this subject has been so well summarized by Fry, L. J., in the 2nd ed. of his work on Specific Performance that it would savor of pedantry to cite and comment upon the cases noted by him. At sec. 555, it is said that "the part performance of a contract by one of the parties to it may, in the contemplation of Equity, preclude the other party from setting up the Statute of Frauds, and thus render it, although merely resting in parol, capable of being enforced by way of specific performance."

Sec. 556. "This exception is based on a principle of common fairness, on the view that it is unjust in a man who has made a bargain with another, to allow that other to act upon it, and then to set up the want of a formality as a bar to its complete performance by himself."

Section 557. "In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title: 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing: 3rdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4thly, there must be proper parol evidence of the contract, which is let in by the acts of part performance."

Section 559. "The true principle, however, of the operation of the acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one;

that they prove the existence of some contract, and are consistent with the contract alleged."

In the present case the counsel for the plaintiff attended at the assizes, and appeared there also for the defendant, with the knowledge and approval of the defendant's solicitor, and stated that the case had been settled out of Court. This was an act done in pursuance of the contract and referred it to a settlement out of Court. It was referred to a contract or settlement, and is consistent with the alleged one.

As to the second circumstance, that the acts must render non-performance a fraud, *Fry*, at sec. 563, quoting Lord Cottenham, in *Munday v. Jolliffe*, 5 My. & Cr. 167, at p. 177, says: "Courts of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagement he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement."

In the present case, the plaintiff with the knowledge of the defendant stayed his action, and was thus delayed in the prosecution of his remedy; and it would be a fraud to allow the defendant to benefit by the act and escape performance because the agreement was not in writing.

As to the third requisite, it is quite clear that the contract or agreement was one of which the specific performance would have been enforced had it been in writing.

And as to the fourth requisite, I never saw the terms of an agreement more fully and accurately established than the present. The solicitors on both sides are highly respectable men. And both of them agree that the terms of the agreement are correctly embodied in the papers prepared for execution.

I may also notice that the expenditure of money on the faith of a contract, will, in many cases, amount to a part

performance. Mr. *Fry* notices a number of such instances: secs. 585, 586. To carry out the principle to its full extent, might cover the case of the payment of the whole of the purchase money. The reason why such payment is not permitted to be a part performance, is stated at sec. 589 to be, because part payment is mentioned in the 17th section of the Statute of Frauds, and is not mentioned in the 4th section. The silence of the statute in that section must be taken to shew that the Legislature did not intend that part payment should be binding in the case of the sale of lands; and secondly, that the money may be repaid, and that both parties will then be in the situation in which they were before the contract, without either party having gained any inequitable advantage over the other.

While stating the result of the decision, the author is not satisfied with the reasoning upon which it is based.

If the defendant is unable to obtain the releases and grants he agreed to procure, the plaintiffs may have compensation awarded to them, the amount of which may be ascertained by a reference to the Master.

While I thus think the plaintiffs entitled to specific performance, it is plain that the execution of the judgment may involve delay and expense; and it may be more for their advantage to be permitted to prosecute the action so stayed, or to proceed in this action for the recovery of the rents, &c., the subject of that action. The action having been stayed upon the faith of the agreement, if the defendant refuse to carry out the agreement the right of action must revive. And this remedy may be given under the prayer for general relief, all the facts appearing in the pleadings.

I therefore give the plaintiffs the option of taking a judgment for specific performance with a reference as to compensation, if the defendant is unable to procure all the grants and releases he agreed to procure; or to take a judgment for an account of the rents and profits the subject of the former action.

The plaintiffs are entitled to costs to the hearing, further consideration and subsequent costs reserved.

In Hilary Sittings, 1887 *R. S. Cassels* moved on notice to set aside the judgment entered for the plaintiffs, and to enter judgment for the defendant, dismissing the action with costs.

During the same sittings, *R. S. Cassels* supported the motion, and referred to *Fry* on Specific Performance, 2nd ed., sec. 559, 568, 977; *Maddison v. Alderson*, 8 App. Cas. 467, 479, 485; *Lester v. Foxcraft*, 1 W. & T. L. C. in Equity, 6th ed., 881; *Magee v. Kane*, 9 O. R. 475; *Reed* on Statute of Frauds, sec. 554; *Campbell v. McKerricher*, 6 O. R. 85.

*Aylesworth*, contra, referred to *Heard v. Pilley*, L. R. 4 Ch. 548; *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314; *Roberts v. Hall*, 1 O. R. 388; *Cook v. Wright*, 1 B. & S. 559; *Barnes v. Wood*, L. R. 8 Eq. 424; *Barker v. Cox*, 4 Ch. D. 464; *Roach v. Trood*, 3 Ch. D. 429; *Varden v. Varden*, 6 O. R. 719.

*R. S. Cassels*, in reply, referred to *Browne* on Statute of Frauds, 4th ed., secs. 145, 268; *Reed* on Statute of Frauds, secs. 691, 735; *Cameron v. Brooke*, 15 Gr. 693; *Wood v. Hamilton and North-Western R. W. Co.*, 25 Gr. 135; *Smith v. Webster*, 3 Ch. D. 49; *Munday v. Asprey*, 13 Ch. D. 855; *Goodall v. Harding*, 52 L. T. N. S. 126; *Bushell v. Pocock*, 53 L. T. N. S. 860.

March 12, 1887. GALT, J.—The learned Vice-Chancellor has gone so lucidly into all the evidence and cited the authorities on which his judgment is based, that it is unnecessary to do more than refer to his judgment to ascertain what is the exact position of the defendant. The simple question being whether under the circumstances therein set forth, a decree for specific performance of an agreement relating to the conveyance of real estate can be made, there being no agreement in writing signed by the defendant.



The learned counsel R. S. Cassels, by whom the case was argued for the defendant, relied on two objections—viz., that as the releases referred to were to be executed by two married women and two infants, and as the defendant might be and was unable to procure them, specific performance could not be decreed; and for this he cited *Fry* on Specific Performance, 2nd ed., sec. 977, where it is laid down: “As the consent of a third party, is or may be, a thing impossible to procure, a defendant who has entered into a contract to the performance of which such consent is necessary, will not, in case such consent cannot be procured, be decreed to obtain it, and thus perform an impossibility.”

A number of cases are cited in support of this; and it was not disputed by Mr. Aylesworth; but he contended that the judgment was not a decree absolute, but was conditional, namely, that if the defendant alleged that he was unable to procure the execution of the releases, there should be a reference as to compensation, or that the plaintiff might have judgment for the rents and profits, the subject of the former action.

The defendant has no defence to the latter part of the decree. It was proved that he had been in receipt of those rents and profits; and all that the learned Vice-Chancellor did in the judgment before us, was to declare that in the event of his being unable to carry out the terms of the agreement he should account for them.

The second objection urged by Mr. Cassels, was, that in absence of a written agreement there should be no decree for a specific performance against the defendant, even as respects the release of his own rights to the lands in question; and he relied on the case of *Maddison v. Alderson*, 8 App. Cas. 467. That case, however, differs very materially from the one now before us. It was an action brought to recover possession of certain title deeds. The defence by the original defendant Maddison was, that she was entitled to their possession, on the ground that by an agreement between her and one Thomas Alderson, who was at the time of his death, the owner of the land, it was agreed

that if she would continue in his service till his death he would leave her a life interest in the property by his will: that he did make such will in her favour, but that through some mistake in the execution of the will, it was void; and she claimed specific performance of this agreement. When the case came before the House of Lords, it is plain from all the judgments the learned Judges were not satisfied that that appellant had proved such agreement; and they were of opinion that, even if such an agreement had been proved, it would not avail against the Statute of Frauds.

The Lord Chancellor sums up the case of the appellant as follows, at p. 472: "The case thus presented, was manifestly one of conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor farm by will, rather than one of definite contract for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his service at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity."

The circumstances of the present case are entirely different; the agreement and the terms of it were proved beyond all question. On his examination at the trial, after giving his evidence in a most unsatisfactory manner, the defendant was asked as to the settlement of the suit that was then about to come to trial at Cobourg. He is asked in reference to a preliminary examination that had taken place before Mr. Fisher. "Q. Do you remember what you said before, Mr. Fisher? A. I don't remember. Q. Did you say this: 'I was

to release my share and the widow's share and my wife's, and Mr. Frances Coates were to bar their dower in both deeds. Nothing was said about what land they were to bar their dower in? A. I believe that is what I said. Q. Is that correct? A. Yes."

This shews what the then agreement was. Subsequently in the interest of the defendant, Mr. Chisholm, his attorney, insisted that all the heirs interested in the lands, should join in a release to the defendant of all claims arising out of his possession of the lands; and in consequence a release was prepared and submitted to Mr. Chisholm, and approved of by him. The execution of this release was obtained by William Coates, the plaintiff, in the original action, and executed by all the now plaintiffs. This was not done without considerable trouble and expense, as they are widely scattered, some in this Province and some in the United States. The form of release was settled and approved by Mr. Chisholm before it was executed; but when, after a considerable length of time had elapsed owing to the difficulty experienced in obtaining the respective signatures, it was sent to Mr. Chisholm to be executed by the defendant, he refused to have anything to do with it; and in consequence this action was brought.

We find, therefore, that a suit brought in respect of the receipt by the defendant of the rents and profits of the land was stayed by an agreement entered into between the parties thereto—that a release was prepared and the execution thereof obtained at considerable trouble and expense in accordance with that agreement. I think, therefore that the case is brought within that portion of the judgment of the Lord Chancellor, in which he says, (after referring to a case where there had been a verbal contract for the purchase of land and money paid and expended on the subject matter of the contract: "The matter is advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached, cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not

always possible or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed, but it is not arbitrary or unreasonable to hold that where the statute says, that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and only that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract."

It appears to me the case we are now considering comes clearly within the doctrine therein laid down. The plaintiff had prepared a case and subpoenaed his witnesses for the trial. The case was reported to the Court as settled by consent of both parties, and the plaintiff subsequently incurred considerable expense and trouble in carrying out his part of the agreement upon which the case had been settled.

CAMERON, C. J., and ROSE, J., concurred.

*Motion dismissed, with costs.*

---



## [CHANCERY DIVISION.]

## CANADIAN BANK OF COMMERCE V. NORTHWOOD.

*Bills and notes—Indorser—Principal and surety—Agreement to extend time—Reservation of rights against sureties—Agreement as to assigning securities—Release of endorser.*

The holders of certain promissory notes agreed with the maker thereof, and certain of the endorsers to extend the time for payment. The agreement expressly reserved all rights and remedies against persons other than parties to the agreement.

*Held*, that under these circumstances a subsequent endorser, not privy to the said agreement, was nevertheless not released thereby, for that his rights against the maker and prior endorsers were not prejudiced, inasmuch as the reservation of the rights of the holder against him, involved the reservation of his rights against the others.

*Held*, also, that the fact that the agreement also provided that upon payment and satisfaction of the holders certain collateral securities were to be assigned to one of the other parties to the agreement did not discharge the subsequent endorser, for the said arrangement was not absolute but limited to those who were parties to it as between themselves only, and did not affect the subsequent endorser's claim to the possession of the said securities if he paid the holders.

THIS was an action by the above Bank against William Northwood, claiming upon a number of promissory notes whereof one John Northwood was maker, and the defendant endorser.

The defendant set up that after the making and endorsing of the notes in question the plaintiffs, by an agreement in writing, of June 20th, 1883, made with John Northwood, in consideration of the assignment by way of mortgage of certain lands agreed to and did extend the time for payment of the said notes for three years from the date of the agreement, without his consent or authority, and he submitted that he was thereby released, and also set up certain other defences founded upon the said agreement which are sufficiently indicated in the judgment.

The agreement in question was made between John Northwood, Andrew Northwood, and Joseph Northwood of the first part, and the Bank of the second part. The three Northwoods were parties to the notes in question. John Northwood as maker, and the other two as prior

endorsers to the defendant herein. The two last clauses of the agreement were as follows :

“ Provided also and these presents are on the express understanding that nothing herein contained shall prejudice or affect or operate as a merger of any security, agreement, or thing whereby said recited indebtedness may be secured or evidenced : nor any rights or remedies which the bank may have against any person or persons other than the parties of the first part, for or in respect of said indebtedness, or any part thereof, and all such rights and remedies are hereby expressly reserved, and these presents are executed on that understanding.

“ And it is hereby lastly agreed between the parties hereto, that as between the parties of the first part the said Joseph Northwood (when and so soon as the claims have been paid in full and satisfied) is as against the said John Northwood and Andrew Northwood, to be entitled to the benefit of all securities held by the bank, and to an assignment thereof.”

This action came on for trial on May 18th, 1887, before Boyd, C.

*Douglas, Q.C.*, and *J. A. Walker*, for the plaintiffs. There is under this agreement an express reservation of remedies. Moreover it does not apply to William who is not a party to it, and does not affect his rights or remedies.

*C.E. Pegley*, for the defendant. We rely on the agreement of June 20th, 1883. The effect of it is to discharge W. Northwood as surety, because time is given, and because of the agreement to renew, and the stipulation for the transfer of part of the principals' property to one of the endorsers on some of the paper. Had W. Northwood sought to pay up the claim and enforce his remedies against the others, he could not have done so in the face of this agreement ; sureties' rights are not preserved under it : *Byles on Bills*, 12th ed., p. 254. We also refer to *Pirie v. Wyld*, 11 O. R. 422 ; *Healey v. Dolson*, 8 O. R. 691.

May 18th, 1887. *BOYD, C.*—Action against the endorser of promissory notes in which it is set up that he was a surety, and has been discharged by an agreement for value to extend the time for payment of the notes by the principal debtor without the consent or knowledge of the defendant. But the agreement expressly reserved all rights and remedies against the surety, and that displaces the defence. It was argued that though the bank's rights against the defendant were reserved, yet there was no reservation of the surety's rights against the principal. This latter reservation is, however, involved in the former. The law is laid down by Harrison, C. J., in *Currie v. Hodgins and Bradford*, 42 U. C. R. at p. 608, in these terms: "Where by the deed which would otherwise operate as a discharge of the surety, there is an express reservation of the remedy against the surety, this necessarily implies that the surety may protect himself by suing the principals, and so the surety whether he had knowledge of the transaction or not, is not discharged." Many cases are cited in support of this position, but not *Webb v. Hewitt*, 3 K. & J. 438, which in *De Colyar on Guarantees*, 2nd ed., p. 324, is referred to as showing that the debtor's consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him. See *Boaler v. Mayor*, 19 C. B. N. S. 76.

It was further argued that there was a discharge, because the agreement provided for renewal for six months from time to time till the whole was paid up. But these renewals were assented to by the defendant who joined therein and is not prejudiced thereby.

It was urged lastly, that the defendant was discharged because he is allowed to stand outside while the bank and principal arrange that upon the satisfaction of the bank the securities are to be assigned to one of the principal debtors. But this is an arrangement not absolute but limited to those who are parties to it as between themselves, and it does not affect or purport to affect the claim of this

surety to the possession of these securities if he pays the plaintiff.

In my opinion, therefore, this line of defence fails, and the matter must be remitted to the Master to take the same accounts as were directed in the case of the *Bank of Commerce against Howard and Northwood* (a.) Further directions and costs will be reserved.

A. H. F. L.

(a) This was a case tried the same day with this case. The reference was to take the account of all matters in the pleadings mentioned.

REP.

---



## [CHANCERY DIVISION.]

## RE BOLT AND IRON COMPANY.

## LIVINGSTONE'S CASE.

*Corporations—Managing director—Remuneration of officer of company—Breach of trust—Set-off—Winding up proceedings—Jurisdiction of Master—Assignment of claim after winding-up order—R. S. C. ch. 129, sec. 77, sub-sec. 2, secs 83, 86, 87, 93.*

By-law 17 of the B. & I. Company provided that the managing director should be paid for his services such sums as the company "may from time to time determine at a general meeting." The only provision made at a general meeting was on January 27th, 1883, as follows: "The salary of the managing director was fixed until October 31st next, as at the rate of \$4,000 per annum." L., the managing director sought to recover for services rendered as such subsequent to October 31st, 1883.

*Held*, that he could not do so.

The position of L. as managing director rendering services for which remuneration was given, was not that of a servant hired by the company, but of a working member of the company, whose rights as to payment were to be measured by the provisions of the charter and by-laws of the company.

L. having withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services after October 31st, 1883.

*Held* that this was a breach of trust on L.'s part, and the amount thus withdrawn formed a debt based on a breach of trust, recoverable by the liquidator, under the special provisions of R. S. C., ch. 129, and as to which no set-off was permissible against any debt or dividend due from the company to L.

*Held*, also, that the Master had jurisdiction under sec. 83 of the said Act to investigate this transaction in these proceedings, which were for the winding-up of the company, and no formal objection should be allowed to affect the proper operation of that section.

*Held*, further, that the fact that L. had assigned his said claim against the company to his wife, after the winding-up order had been acted on, made no difference, since any such assignment would be subject to all the equities against such claim, and against the assignor as a director and trustee of the company's funds in the proceedings under the winding-up order.

THIS was an appeal from the report of the Master in Ordinary made in these proceedings, which was for the winding-up of the Bolt and Iron Company of Toronto, under 45 Vic. ch. 23 (D.), on December 7th, 1886, in respect to the claims of J. Livingstone, and Catharine J. Livingstone, his wife, which claims the liquidator of the company contested.

It appeared from the report that the claims in question were for the sums of \$13,596.09 and \$3,739.47 respectively, the first mentioned claim having, by an assignment dated December 20th, 1884, been transferred to Catharine J. Livingstone, who had been added as a party claimant; that the said first mentioned claim was in respect of goods received by the company for which J. Livingstone was liable under the circumstances disclosed in the evidence, and that the Master had allowed it at the sum of \$13,380.83, and declared that the same should rank upon the dividend sheet of the company at that sum; that the second claim for \$3,739.47 was for salary claimed by J. Livingstone from May 17th, 1884, till April 30th, 1885; and he added in the words of the third paragraph, "I find that the said J. Livingstone is indebted to the company in the sum of \$2771.32 in respect of moneys withdrawn from time to time from the moneys and assets of the said company by the said J. Livingstone while he occupied the position of president and managing director of the company, the said Livingstone claiming that he was entitled to take the said moneys for salary as such managing director for the period subsequent to October 31st, 1883, but I find that there was no resolution or by-law authorizing the payment or allowance of any salary to the said Livingstone as such president and managing director subsequent to the said date, and I have therefore disallowed the same to him, and find him indebted to the company for the sum withdrawn as aforesaid, and which sum I order and direct the said J. Livingstone to pay forthwith to the said liquidator:" and in words of the 5th paragraph, "The claimants John and Catharine J. Livingstone applied to set off the said sum of \$2,771.32 being the amount found due by the said John Livingstone as aforesaid against the sum of \$13,380.83, which application I refused."

The liquidator thereupon served a notice of appeal from the said report in respect, amongst other things, to the allowance of the claims of the Livingstones, and therein set out that he would ask for an order that in the event

of its being held that the claim in the first paragraph of the said Master's report should be ranked upon the dividend sheet, or in the event of the said John Livingstone being declared to be a creditor of the said company, and entitled to be placed upon the dividend sheet in respect of any claim then that the liquidator be declared entitled to apply any and all dividends that might be declared out of the company's estate upon any or all of the said claims in and towards the payment of the amount found due and owing by the said report, or that might be found due and owing upon this appeal by the said John Livingstone to the said company.

The claimants also served notice of appeal from the report, upon the following grounds :

. Because the said Master in and by his said report has disallowed the sum of \$3,739.47 for salary claimed for the salary of the said John Livingstone from the 17th day of May, 1884, to the 30th day of April, 1885, whereas the said Master should have allowed the same.

2. And because the said Master in and by his said report has found that the said John Livingstone is indebted to the company in the sum of \$2,771.32 in respect of moneys withdrawn from time to time from the moneys of the said company by the said John Livingstone while he occupied the position of president and managing director of the said company as and for his salary as such managing director for the period subsequent to the 31st day of October, 1883, whereas the said Master should not have found the said Livingstone to be indebted to the company in the said sum, or in any sum whatever.

3. The said Master erroneously found that there was no resolution or by-law authorizing the payment or allowance of any salary to the said Livingstone subsequent to the said date, whereas he should have found that there was such resolution or by-law.

4. Even if there was no such resolution or by-law the said Master should have found that the services of the said John Livingstone were continued after the 31st day of October, 1883, at a rate or remuneration equivalent to that formerly enjoyed by him, or that the services having been actually rendered the said John Livingstone was entitled to be paid as upon a *quantum meruit* on a scale equivalent to his former salary.

5. The claimants object to the statement contained in the fifth paragraph of the said report that they applied to set off the amount found due by the said John Livingstone against the sum of \$13,380.83 as not being a correct statement of what took place in the Master's office.

The appeal and cross-appeal came up for argument on May 27th, 1887, before Boyd, C.

*Falconbridge*, Q. C., for J. Livingstone and C. J. Livingstone. The appellant, J., Livingstone, says he was employed by the liquidator after the winding-up order, and the hiring being a yearly hiring was extended. The services were actually rendered, and we should get a *quantum meruit*. We refer to *In re English Joint Stock Bank, Ex parte Harding*, L. R. 3 Eq. 341; *Buckley on Joint Stock Co's.*, 4th ed., p. 314, 364; *Re Oriental Bank Corporation, Macdowall's Case*, 32 Ch. D. 366; *Smith's Master and Servant*, 4th ed, p. 86; *Morawetz on Private Corp.* 1st ed., secs. 79, 84, 247; *Re Lundy Granite Co. v. Harvey Lewis's Case*, 26 L. T. N. S. 673; *In re Paraguassu Steam Tramway Co., Adamson's Case*, L. R. 18 Eq. 670. As to the cross-appeal, sec. 83 of R. S. C., ch. 129, does not apply when the matter in question is set up by way of counter-claim, and not directly by the liquidator. The application under it should be through the Court directly by a substantive proceeding, and cannot be set up as a defence to something else. This is not a case of fraudulent malfeasance, and therefore there should be a set off. The liquidator should have applied for an enquiry: *MacLennan*, O.J. A., 2nd ed. p. 279; Article on Set-off in Joint Stock Companies, 21 C. L. J. N. S., p. 87; *Benner v. Currie*, 36 U. C. R. 411; *Macbeth v. Smart*, 14 Gr. 298. As there was no enquiry under R. S. C. ch. 129, sec. 83, before the assignment to Mrs. Livingstone, her rights are not affected: *In re Park Gate Waggon Works Company*, 17 Ch. D. 234.

*Bain*, Q. C., for the liquidator. Livingstone was not a servant of the company; he was only managing director. He was not a stranger employed by the company. He would only be entitled to this position by virtue of being a director, and his appointment would end with the year when his directorate ended. He was appointed director on July 13th, 1883, and the winding-up order was obtained before the end of that year. There was no resolution of a general meeting for payment of \$4,000 to the managing director except up to October 31st, 1883: *Re Leicester Club and County Race Course Company, Ex parte Cannon*, 30



Ch. D. 629; *Buckley on Joint Stock Companies*, 4th ed., pp. 451-3. As to our cross-appeal, we ask that if Livingstone be held entitled to receive a dividend, there may be a set-off of surplus salary withdrawn by him, namely \$2,771. We have a right to withhold this out of the money coming to Livingstone: R. S. C. ch. 129, sec. 83; *Re Anglo French Co-operative Society*, W. N. 1882, p. 126; *Re Exchange Banking Company*, 46 L. T. N. S. 474, S. C. 51 L. J. Ch. 525. What we claim is a right of retainer till the deficit is made good by Livingstone, who can claim no right of set off: *Buckley on Joint Stock Companies*, 4th ed., pp. 255, 368. As to the assignment to Mrs. Livingstone, it was after liquidation, and could give her no higher right than Livingstone himself had: *In re China Steamship Company, ex parte McKenzie*, L. R. 7 Eq. 240; *In re South Blackpool Hotel Company, ex parte James*, L. R. 8 Eq. 225, *Buckley on Joint Stock Companies*, 4th ed. pp. 362, 367; *In re Mercantile Trading Company, Stringer's Case*, L. R. 4 Ch. 475; *In re Milan Tramways Company*, 22 Ch. D. 122.

May 30th, 1887. BOYD, C.—I agree with the Master's report as to the inability of the claimant Livingstone to recover for services rendered as managing director, subsequent to October 31st, 1883; and also with his finding that this claimant is accountable for and should be ordered to repay the sum of \$2,771.32 withdrawn by him from the moneys of the company on the assumption that he was entitled to this money in payment of his services after October 31st, 1883. This finding grew out of the claim of Livingstone to be paid further sums for salary, and it was adjudicated upon by the Master under a counter-claim presented by the liquidator in respect of this over payment. The Master had jurisdiction under sec. 83 of the Winding-up Act, R. S. C. ch. 129, to investigate this transaction, and no formal objection should be allowed to affect the proper operation of sec. 83, in respect of this sum of \$2,771.32. See sec. 77, sub-sec. 2, and secs. 86, 87, and 93.

The position of the managing director rendering services for which remuneration is given, is not that of a servant hired by the company. His position is aptly defined by Pearson, J., *In re Leicester Club and County Racecourse Company, Ex parte Cannon*, 30 Ch. D. at p. 633, as a working member of the company who gets paid for the work he does. The rules as to hiring and notice between master and servant are therefore not applicable, and the measure of the rights of the salaried managing director is to be settled by what is provided in that behalf by the charter and by-laws of the company. In this case as in the *Leicester Club Case*, the company's by-law No. 17 provides that, "The directors and managing director shall be paid for their services such sums as the company may from time to time determine at a general meeting." The only provision made at a general meeting was, that which was approved of on January 27th, 1883, in these words: "The salary of the managing director was fixed until the 31st day of October next, as at the rate of \$4,000 per annum." Beyond that period (October 31st) the company has not exercised its discretion under the by-law, and therefore beyond that period no rate of remuneration was fixed or is recoverable.

Then on the other hand it was a breach of trust on the part of Mr. Livingstone to pay himself after that date the sum of \$2,771.32. He withdrew from the company moneys to which he had no legal or equitable right, and his position is identical with that of the directors, whose liability was discussed in *In re Anglo-French Co-operative Society, Ex parte Pelly*, 21 Ch. D. 492. That is to say, it is a debt based on breach of trust, recoverable by the liquidator under the special provisions of the Act, and as to which no set-off is permitted against any debt due by the company to the director. This \$2,771 is money withdrawn from the company which has to be paid back to the assets of the company in full. The duty of the director who has thus misappropriated the funds of the company which were placed in his charge is to replace

those moneys without deduction, and in some cases even with interest. Till he does so, the course of equity would be to withhold from him any benefit he might otherwise be entitled to from the distribution of the company's assets in the winding-up proceedings. In this case the Master has allowed him to rank as a creditor for \$13,380.83; and it is stated and not objected to, that the dividend on his claim will not exceed this amount which Mr. Livingstone is ordered to refund to the assets. The application is now in effect to ask a declaration that he shall not receive any dividend till he has made good this \$2,771, or in other words, that the liquidator may be authorized to retain from the dividend sufficient to satisfy this claim. There is a natural equity in the liquidator being allowed to pay himself out of the funds in hand, which would be otherwise payable to the debtor. The only obstacle is, that this claim on the company has been assigned by Livingstone to his wife. But that assignment is not proved to be for value, and was not treated by the Master as divesting Mr. Livingstone of interest therein, as the matter was thereafter prosecuted in the name of him and his wife. Besides this, that assignment was after the winding-up order had been acted on, and any such assignment would be, in my opinion, subject to all the equities which would arise against this claim and against the assignor as a director and trustee of the company's funds, in the proceedings under the winding-up order. Before the assignment in this case, the assignor was liable for the debt in respect of the assets withdrawn, which was also a breach of trust, he could thereafter assign no right to prove a claim against, or to receive any distributive share in those assets, unless subject to the usual equity of first making good the breach of trust. The principle is recognized by Lord Selborne in *In Re Harrold, Wilder v. Walford*, 53 L. J. Ch., 505 in which he says, when a person is indebted to a trust estate, he cannot get any costs or anything else out of such estate till he has paid the debt due from him to it, and his solicitor cannot be in any better position than he is himself. See

also *Wilson v. Gabriel*, 4 B. & S. 243; *In re Knapman*, *Knapman v. Wreford*, 18 Ch. D. 300; *Ex parte Young*, *In re Day*, 27 W. R. 942; *In re Milan Tramways Company*, *Ex parte Theys*, 22 Ch. D. 122, 25 Ch. D. 587; *In re China Steamship Company*, *Ex parte MacKenzie*, 7 Eq. 240.

The result is, therefore, that the appeal of Mr. Livingstone as to salary is dismissed, with costs. As I have not dealt with the other cross-appeal, but dispose of it on the collateral matter argued, it is better to give no costs as to that branch of this appeal and application, except that the liquidator get his costs out of the estate.

A. H. F. L.

---



## [CHANCERY DIVISION.]

## DOWNEY V. DENNIS.

*Power of sale—Jurisdiction to restrain imprudent sale—Trustees—Sale without reserve.*

*Held*, that the Court has jurisdiction to prevent trustees about to sell property under a power or trust for sale, from selling in an imprudent and improper manner; and thus in this case where it appeared that although *cestuis que trustent* representing five-sixths of the property desired a sale without reserve, the interests of the remainder would be prejudiced by so selling, an injunction was granted to restrain such trustees from selling without a reserve bid.

THIS was a motion for an injunction to restrain trustees, acting under a power of sale, which is set out in the judgment, from selling certain real estate without any reserve bid. The facts of the case fully appear from the judgment of Ferguson, J.

*Hon. O. Mowat, A. G.*, for the plaintiffs. The right to bid is no protection to the plaintiffs at all. A reserve bid would have protected them, but the sale is to be without reserve. The sale proposed will be wanting in a proper discretion, and should be enjoined, although it is true that a majority of the heirs are in favour of it. A mortgagee or creditor may be entitled to an absolute sale, but none of the parties here is a creditor or a mortgagee. The Court will interfere to prevent a sale by trustees proposed to be made under such circumstances as would entitle the owner to a remedy afterwards: *Lewin on Trusts*, 7th ed., pp. 398, 726; *The Attorney-General v. The Mayor, &c., of Liverpool*, 1 My. & Cr. 171, 210; *Joyce on Injunctions*, vol. 1, p. 548, and cases cited; *Kerr on Injunctions*, 2nd ed., p. 461. This is not a case where the rule as to balance of convenience applies.

*Hoskin, Q.C.*, for two infant defendants. I also submit that the sale without reserve should not be permitted. A "reserve bid" is the rule of the Court: *Lewin on Trusts*, 8th ed., p. 389; *Daniel's Ch. Prac.* vol. 2, p. 1594. Lunatics

and infants are always protected by a reserve bid ; *Dance v. Goldingham*, L. R. 8 Ch. at p. 912. The testator has not said anything as to the mode of sale.

*Z.A. Lash*, Q. C., and *Roaf* for the adult defendants. Our affidavits shew that in the opinion of the deponents, auctioneers and land agents, a sale without reserve is the best way. We represent the preponderating interest by far, and the balance of convenience is to refuse the injunction : *In re Blake, Jones v. Blake*, 29 Ch. D. 913 ; *Tempest v. Lord Camoys*, 21 Ch. D. 571 ; *Thomas v. Williams*, 24 Ch. D. 558 ; *Lewin on Trusts*, 8th ed., p. 613.

July 6th, 1887. FERGUSON, J.—The motion is for an order restraining the defendants Henry Dennis and John Dennis, who are trustees under the will of their late father Joseph Dennis, from selling or taking proceedings to sell valuable property in the city of Toronto, except upon condition of there being a reserve bid upon the property or upon the various parcels in which the same is proposed to be sold. The notice of motion contained other matters, but at the argument, this is all that was asked.

The property in question is of very great value ; said to be of the value of \$300,000.

The plaintiffs are trustees of the marriage settlement of one of the persons entitled under the will, and as such trustees are entitled to a sixth share of the property or of the proceeds of the sale thereof.

The property is, as was stated on the argument, vested in the trustees. The authority to sell contained in the will as shown by the affidavit of Mr. Downey, is as follows :

“ And whereas trouble and discontent may arise among my family with regard to the property which I own in the city of Toronto, on account of its being put out of the power of my trustees to sell or dispose of said property. I hereby order, direct, and fully authorize at and after twenty years of my death, my trustees to whom I have hereinbefore devised my property in Toronto in trust, or

the survivors or survivor of them, or the heirs, executors, or administrators of such survivor of them, to absolutely sell and dispose of the said property in Toronto to the best advantage, provided only that it be the wish of the majority of my heirs who may then be living to do so, and not otherwise, and the proceeds thereof to be equally divided between them all, share and share alike," &c.

The twenty years from the death of the testator expired on the 17th or 18th day of June last. It is not disputed that the majority of the "heirs" mentioned in the will, and also a majority of the persons now entitled to the property or the proceeds of the sale of it, are assenting to the proposed sale.

The trustees have advertised the property for sale by public auction on the 9th day of July inst. For the purposes of the sale, the property is divided into ten parcels. The sale is advertised to be, and is intended to be a *sale without reserve*, as I understand the matter, in this respect the equivalent of a forced sale of the property. The advertisement has been for the period of about a month.

To this mode or manner of sale the plaintiffs object, alleging that the circumstances are such that they cannot protect their interests in the property by bidding at the proposed sale, whereas three or more of the persons entitled to interests in the property are gentlemen of wealth, and are not in the same danger or supposed danger as they the plaintiffs are in this respect.

The plaintiffs contend that a sale of the property in the manner proposed without a reserve bid, would be an imprudent and improper sale, not such a sale as a prudent owner would make of his own property; and that a sale made and carried out in the manner proposed by the trustees will endanger their interests, and for this reason they ask the relief aforesaid.

The defendants contend the contrary of this, and besides contend that the Court has no power to interfere with the exercise of their discretion by the trustees in the conduct of the sale; that in the absence of collusion or

bad faith, the confidence and trust reposed in them by the testator cannot be interfered with by the Court.

First, then, as to the prudence and propriety or not of the proposed sale. The defendants have produced many affidavits stating the opinions of gentlemen who, according to what they say, have had much experience in the sales of lands and in land transactions in and about Toronto. These opinions are to the effect that the mode of sale proposed is calculated to attract bidders, and that it is an unobjectionable and good mode of sale.

The affidavits on behalf of the plaintiffs, not so many in number as those of the defendants, state opinions the contrary of those stated in the defendants' affidavits, and some of these affidavits on behalf of the plaintiffs are made by gentlemen having the like experience as the deponents who make the defendants' affidavits.

The plaintiffs' affidavits indicate that property is not usually, and indeed rarely, if ever, sold in Toronto in the way proposed for the sale of this property.

The defendants' affidavits show in this respect the bare opinions of the respective deponents; but just as I am writing this the defendants carry in a supplemental affidavit made by Mr. Oliver, an auctioneer in Toronto, in which are stated some instances of sales without reserve made in Toronto; and an instance of the effect of adjourning a sale. One is an instance of a sale of leasehold property at so much per foot; another is of a like kind; another is of the sale of a lot on King street west, near Simcoe street; and still another of a sale of stock of the Consumers' Gas Company.

It is said that this supplemental affidavit has been brought in by reason of a question asked by me during the argument, and looking at it in that light, the attention of the defendants having been so called to the subject, and considering the immense number of sales that must have been conducted by Mr. Oliver during past years, I am not disposed to think that it adds much if any strength to the evidence on this subject before given on behalf of



defendants. And when I look at all the evidence before me on this motion, and in so doing employ what I consider to be common knowledge, and what I think I have a right, and am under such circumstances bound to employ, I have no hesitation in saying that, in my opinion, the proposed mode of sale of this property is imprudent and improper, and if persisted in and carried out, may prove to be dangerous if not disastrous to the interests of the plaintiffs. To my mind, there is all the danger of loss to the plaintiffs that is usually attendant upon a forced sale, as compared with a sale made in what is ordinarily considered a sale made in a reasonable way ; and in this instance, I think the danger of loss would be increased by reason of the large value of the property and the consequent small number of persons in a position to bid at the sale.

At this moment an affidavit of the purchaser of the lot on King street west, mentioned in the aforesaid supplemental affidavit of Mr. Oliver, accompanied by the conditions of that sale or a copy of the same is produced, showing that in respect to the sale Mr. Oliver's affidavit is erroneous and quite contrary to the fact regarding a reserve bid, for there it appears that the vendor had by the conditions of the sale a "reserve bid."

The plaintiffs' evidence has a tendency to show that the advertisement of the property is not reasonably sufficient in respect of length of time, but this matter was not insisted upon at the argument upon the motion ; indeed only the one thing was insisted on—namely, the necessity of an "upset price," or "reserve bid," or the same degree of protection to the plaintiffs as would be afforded by either of these.

Then as to the jurisdiction or authority of the Court to interfere.

I think the real point is concisely put by the Master of the Rolls, the late Sir George Jessel, in the case of *Tempest v. Lord Camoys*, 21 Ch. D. at p. 578. I do not say that the case was precisely like the present case, but what

appears to me to be the real point was necessarily involved. That learned, and as generally acknowledged, very able Judge said : " It is very important that the law of the Court on this subject should be understood. It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. The Court says that the power if exercised at all is to be properly exercised."

In *Joyce* on Injunctions, at p. 548, the case of *Pechel v. Fowler*, 2 Anstr. 549, is referred to as being a decision showing that an injunction should not be granted in such a case, because if the trustees sold in such a manner as to commit a breach of trust they would be liable ; but the case of *The Attorney-General v. The Mayor of Liverpool*, 1 My. & Cr. 174, is there also referred to, in which the Master of the Rolls said that it had become the invariable practice, when any act involving a breach of trust was intended to be done, though not in its consequences *irremediable*—where for instance trustees contracted to sell without proper care, or in a way which the parties interested considered inconsistent with the trust, to apply to the Court to prevent them. The Master of the Rolls then referred to *Pechel v. Fowler*, by saying that he believed it had been overruled as often as it had been considered.

I think I need not write more regarding the power to interfere. I have looked at all the cases and books that were referred to by counsel, and I think that the authority is abundant to show that the Court has the power to interfere as asked in this case.

As before stated, I am of the opinion that the proposed mode of sale is imprudent and improper. The trustees are, I think, proceeding to a sale of the property without proper care, and are, I cannot but think, endangering the rights and interests of the plaintiffs in a way that is needless, which interest of the plaintiffs is so substantial that according to the statement of one counsel, it is

of the value of \$50,000, and according to the statement of the opposing counsel of the value of \$40,000.

Under such circumstances, I should not, I think, hesitate in granting the relief that is asked by the plaintiffs.

I may, indeed, I should, add that I do not think the defendants make a sufficient case against the plaintiffs on the ground of delay in making this motion.

There will be the order for the injunction, restraining the defendants, the trustees, from proceeding with or carrying out the proposed sale without a reserve bid for the protection of the plaintiffs. This is all that at present is asked, but the parties may agree upon a course that will require the working out of some details, and if I can be of any service to them, I shall be glad to make the effort to aid them.

A. H. F. L.

## [CHANCERY DIVISION.]

## MCGEE V. KANE.

*Trial of action after unsuccessful demurrer—O. J. A. 1881, sec. 44—Action for recovery of land—Onus—Admissions in pleadings—Estoppel by conduct—Advertisement of sale of lands under execution.*

Where a statement of claim in an action for the recovery of land was held good on demurrer, and upon the case going down to trial, the plaintiff proved all the material allegations in it.

*Held*, that he was thereupon entitled to judgment, and that O. J. A. 1881, sec. 44, did not apply, and an objection that the plaintiff had not sufficiently proved his title could not be entertained.

*Johnasson v. Bonhote*, 2 Ch. D. 298, distinguished.

Where in an action for recovery of lands by M. who had bought them at a sale under execution against J. K., it was objected that he had failed to prove that J. K. had at the time of such sale any title to the said lands.

*Held*, that it was no answer to this objection to say that the defendant had in setting up certain facts "by way of a further and separate defence" alleged that J. K. was the patentee of the lands in question, for that such an allegation could not be made use of by the plaintiff to satisfy any defect in his evidence to prove his case, the burden of which rested on him by reason of the said defendant having pleaded possession in herself and her tenants.

*Held*, also, that the fact that in the course of certain prior proceedings had by M. on an execution against A. K. the wife of J. K., for the purpose of selling the said lands, M. had then asserted that they belonged to her, did not estop M. from now as against J. K. and A. K., alleging that they belonged to J. K.

Fraud is necessary to the existence of an estoppel by conduct, and a representation to form such an estoppel, must have been made to one ignorant of the truth, and by one with knowledge of the facts.

Where an advertisement of the sale of lands by a sheriff under writs of execution, stated that the sheriff had seized and taken them in execution, and that they or the right and interest of the judgment debtor therein would be offered for sale.

*Held*, that this was sufficient, and that it was not necessary for the advertisement to define more particularly the nature of the estate or interest to be sold.

THIS was a demurrer to a statement of claim, and subsequently a trial of a certain action for the recovery of the possession of lands, wherein Charles Magee, administrator of one Nicholas Sparks, deceased, was plaintiff, and Annie Kane and James Kane were defendants.

The contents of the pleadings and the evidence adduced are sufficiently set out in the judgments.

The demurrer came up for argument on March 22nd, 1887, before Robertson, J.



*McCarthy*, Q. C., for the demurrer. The plaintiff claims title through James Kane, but shows no title in him: O. J. A. Rules 125, 128, 144; Macl. O. J. A. 2nd ed., pp. 277, 298. The effect of a deed is not a fact. The fact that it is alleged that James was owner is rather rebutted by the allegation that Annie is in possession. Then even conceding that title is shewn in James, it is not shewn that Annie's title has been disposed of. The allegation that certain deeds were declared void, does not shew that Annie Kane had not another title. Besides the setting aside of the conveyance as fraudulent is not sufficient. The deed may be good still in some respects. The plaintiff should have alleged that the deeds were set aside in reference to the judgment.

*Shepley*, contra. The estate and title in James Kane is sufficiently alleged; and it is also shewn how Annie's title was disposed of: *MacDonald v. McCall*, 12 A. R. 593. If the statement of claim is embarrassing an application can be made in Chambers.

April 18th, 1887. ROBERTSON, J.—This is a demurrer by the defendant Annie Kane to the plaintiff's statement of claim. The action is brought to recover possession of certain lands in the city of Ottawa. The statement of claim sets forth in effect as follows: The plaintiff recovered, on December 3rd, 1884, a judgment in this Court against the defendant James Kane, who is the husband of the defendant Annie Kane, for the sum of \$593.32; and also for the further sum of \$638.20: that afterwards the plaintiff caused to be sued out writs of *fi. fa.* against goods, &c., and lands directed to the sheriff of the county of Carleton, which were placed in the said sheriff's hands, and such proceedings were thereupon had under and by virtue of the said several writs of *fi. fa.* and renewals thereof, that afterwards, the lands in the pleadings mentioned were seized and sold as being the lands of the defendant James Kane, and afterwards on the 15th day of January, 1887, the said sheriff conveyed the same to the

plaintiff, he having become the purchaser thereof at the sale on the 10th day of the said month of January. Previous to this, on March 14th, 1882, the defendant James Kane granted and conveyed the lands to one John C. Grant, who, on the same day, granted and conveyed them to the defendant Annie Kane. Afterwards, and while the aforesaid writs were in full force, the plaintiff brought an action against the defendant Annie Kane, for the purpose of having it declared by this Court, that the said several conveyances to and from Grant, were fraudulent and void as against the plaintiff, as a creditor of the said defendant James Kane, and the plaintiff succeeded in that action and on the 28th day of October, 1885, recovered judgment therein, in and by which it was declared the said conveyances from the defendant James Kane to John C. Grant, and from John C. Grant to the defendant Annie Kane, were fraudulent and void as against the plaintiff as creditor of said James Kane. It was after this that the said lands were advertised and sold by the said sheriff—viz., on the 10th day of January, 1887, as above stated. Having got rid of any title that the defendant Annie Kane then pretended to have, so far as appears by the statement of claim, the plaintiff brings this action to recover possession of the lands from both James Kane and Annie Kane, who are alleged to be husband and wife, residing together. In the 16th paragraph of the statement of claim, it is alleged that “The said defendants James Kane and Annie Kane are in possession of said lands, and in receipt of the rents and profits thereof.”

To this statement of claim, the defendant Annie Kane demurs on the ground that, “while it alleges the said defendants’ possession of the lands in question, it does not disclose any title of the plaintiff thereto, nor any estate of the plaintiff, as against the said defendant Annie Kane.”

In considering this question, I will discuss it as if this action was brought against the defendant Annie Kane alone. How does the case present itself from that point of view? We have the plaintiff setting out facts which

shew that if James Kane had a good title to the land at the time the plaintiff placed the writ of *fi. fa.* against the lands in the sheriff's hands, that title is now in the plaintiff and would entitle him to recover against James Kane were he in possession, but we find another person in possession, who also claims title to the same lands through the same James Kane, and that title appears to be paramount to the plaintiff's title, inasmuch as the title by conveyance derived by the defendant through Grant, was made to her in 1882, more than two years before the plaintiff recovered his judgment against James Kane; and the plaintiff alleges in paragraph 14 of his statement of claim, that "the defendant Annie Kane claims to be entitled to the said land by virtue of two several conveyances," &c., being the two conveyances before mentioned to and from Grant. But the plaintiff goes on and shews that these conveyances at his instance were by this Court in an action brought by him against Annie Kane, declared to be fraudulent and void as against him as a creditor of James Kane. Here then we have it alleged: 1st. That the plaintiff caused the lands in question to be seized and sold as the lands of James Kane; 2nd. That he the plaintiff became the purchaser of these lands; 3rd. That the sheriff conveyed them to him, under and by virtue of the sale to him under the writs of *fi. fa.* against the lands of James Kane; and if nothing else was in the way, that would be sufficient to entitle him to recover; but, 4th. The plaintiff alleges the defendant Annie Kane, notwithstanding that this Court has declared the conveyances through which she claims to be entitled, fraudulent and void as against him, still retains possession, and is in receipt of the rents and profits, and refuses to deliver up possession to the plaintiff, and still retains possession, although notice to quit and deliver up possession has been duly served upon her. In my judgment that is all that is necessary under the present rules of pleading. Here the plaintiff concisely states the material facts on which he relies, and that is sufficient. I do not think it necessary that it should be

alleged that the defendant Annie has no other, or claims to have no other title. She has asserted her title to be by virtue of these conveyances which have been declared fraudulent and void as against this plaintiff, and notwithstanding that judgment, she retains possession by virtue of them. I think, therefore, the objection taken by the demurrer is not well taken and must be disallowed, with costs.

The action afterwards came on for trial at Ottawa, on June 2nd, 1887, before Ferguson, J.

*Christie*, Q. C., and *O'Gara*, Q. C., for the plaintiff. The sale gave the purchaser the property as it was before the conveyance to his wife. The land was advertised, the land was conveyed to the purchaser, not the interest of James Kane. The advertisement was read at the sale.

*McCarthy*, Q. C., and *Mahon* for the defendant, Annie Kane. There is no evidence that James Kane was owner of the property, or that he was in possession at and before the sale. On the other hand there is evidence of possession in Annie Kane for fifteen years. It was only the interest of James Kane that was actually sold; neither the advertisement nor the deed can enlarge this. The matter cannot be worked out under sheriff's sale: *R. S. O. ch. 49, secs. 10, 11*. When the sheriff surrenders his independent position, and is controlled by the plaintiff, the latter becomes the vendor and cannot become the purchaser. We do not claim damages on account of the sale, but it should be set aside. The counter-claim should be amended: *Johnasson v. Bonhote*, 2 Ch. D. 298. The points raised on the demurrer can be considered at the hearing. The plaintiff is estopped as in *The Merchants Bank v. Lucas*, 13 O. R. 520, having in a former suit taken proceedings to sell the lands as the land of Annie Kane.

*Dowlin*, for the defendant James Kane.

*O'Gara*, in reply. The defendant Annie Kane is estopped from saying that her husband had not title, because



the judgment in the former action declared the deed to her was fraudulent as against the plaintiff. The plaintiff had a lien upon the property when he put his writ in the sheriff's hands. The price given was not inadequate under the circumstances. No one was misled by the advertisement. There is no such estoppel as is contended for by the plaintiff. No representation made could destroy a title that had become perfect by the sale. She should sue for the money.

June 10th., 1887. FERGUSON, J.—The action is for the possession of land situate in the city of Ottawa. The defendants are James Kane and Annie Kane, his wife. The one who defends most actively is the defendant Annie Kane. The plaintiff's title is by virtue of a purchase at sheriff's sale under an execution against lands issued in an action in which he was the plaintiff, and the defendant James Kane was the defendant, and a conveyance by the sheriff to him, the plaintiff.

The defendant, Annie Kane, sets up by her defence that she is in possession by herself of part of the lands in question, and by her tenants of the residue thereof. She also sets up special defences, and pleads a counter-claim.

The plaintiff, in his statement of claim, refers amongst other things to the proceedings in an action between himself and the defendant James Kane, the sale (under the writ of execution) to him, and the conveyance from the sheriff to him in pursuance of the sale. The statement of claim was demurred to by the defendant Annie Kane, and the judgment upon the demurrer was in favour of the plaintiff, and overruling the demurrer.

At the trial the plaintiff proved, I think, all the material allegations in the statement of claim. On the argument it was objected that the plaintiff had not shown that the defendant James Kane had any title to the lands before the sale of them by the sheriff, or even that he had been before that time in possession of, the lands so that a title in him might be presumed. To this it was answered that the

statement of claim had been fully proved, and that as this statement had been held good on demurrer, the objection was not well taken.

It was also answered that the defendant Annie Kane had, in her special defence stated and admitted that the defendant James Kane was the patentee of the lands in question.

This statement in the special defence is contained in the eighth paragraph, and is by reference to the first paragraph of her counter claim (*a*). In this eighth paragraph the allegation is "by way of a further and separate defence," and I do not see that the allegation can be made use of by the plaintiff to satisfy any defect in his evidence to prove the case, the burden of which rested upon him by reason of the pleading of this defendant, which alleges possession in herself and her tenants as aforesaid. I think the pleading put the plaintiff to the proof of his case.

As to the judgment upon the demurrer to the statement of claim, it was contended by the defence that it was not

(*a*) Par. 8th of defence: "And the said defendant Annie Kane by way of a further and separate defence alleges, and relies upon the facts set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, and 12 of the counter-claim of the said defendant Annie Kane hereinafter contained."

Par. 1. of the counter-claim which was for damages: "James Kane, in the plaintiff's statement of claim mentioned, was the patentee of the Crown of the said lands, and was thereby entitled as trustee for her of an estate of fee simple in possession therein prior to the date of the conveyances in the next following paragraph mentioned."

The counter-claim then went on to set up the conveyances of March 14th, 1882, to J. C. Grant, and from Grant to Annie Kane: the judgment recovered by the plaintiff on October 28th, 1885, declaring the same void as against him: the writs of *feri facias* against the lands of James Kane placed by the plaintiff in the hands of the sheriff; the sheriff's advertisement for the sale of the lands under the said writs, and the sale pursuant thereto; that the sale was not properly and regularly advertised, and consequently there were no bidders; that the plaintiff nevertheless ordered the sale to be proceeded with, and in order to give color to the proceedings procured the attendance of several bogus bidders to said sale: that the price for which the plaintiff purchased was a gross undervalue, the lands being worth \$2,500, more than the plaintiff paid for them: that on January 15th, 1887, the sheriff conveyed them to the plaintiff who thus and not otherwise claimed to be owner thereof.

binding upon me at the trial of the action, and that the whole case was before me. For this contention of the case, *Johnasson v. Bonhote*, 2 Ch. D. 298, was relied upon, but I do not think that case an authority which supports the contention. In that case, the learned Judge at the trial followed his own judgment upon the demurrer. There was an appeal from the judgment at the trial to the Court of Appeal, which Court reversed the judgment at the trial, not (as I understand the case) on the ground that the Judge pursued a wrong course in following the judgment on the demurrer, but that the judgment on the demurrer was itself not good law, holding also that it was not too late, if necessary, to grant leave to appeal from the judgment on demurrer; but having all the facts before it, the Court made a final disposition of the case. Whatever may be the full and true meaning of the decision, I am far from thinking it an authority for saying that a Judge at the trial can, or that he should virtually overrule a judgment upon demurrer in the same case, even if his opinion were adverse to the judgment, and I think I should not attempt to do so in the present case.

The statement of claim does not allege that the defendant, James Kane, had title to the land prior to the sale by the sheriff, or that he had been in possession of the land. The plaintiff did not prove that the defendant James Kane, had had a title or been in possession.

It was not, however, disputed that all the material allegations in the statement of claim were proved, or that the same statement of claim had been held good upon demurrer. The judgment upon the demurrer is now before me. The rule that a party should not succeed upon proving his pleading unless the Judge is of the opinion that he should succeed (O.J.A., s.44) cannot, I think, be applied to a case where the pleading has (as in this case) been held good upon demurrer. The position seems to me to be this: the plaintiff states his case; the Court decides that that is a good and sufficient case; and the plaintiff then at the trial proves the whole of the case so stated, which leaves the

Judge at the trial no course (so far as the plaintiff's case is concerned) but to decide in his favour, whatever may be the powers and duties of a Court of Appeal in case the contention should be brought before it.

One of the special defences of the defendant Annie Kane has reference to the proceedings had for the purpose apparently of selling the same land upon an execution issued by the plaintiff in a suit in which he was plaintiff and she (the defendant Annie Kane) the defendant. (a) The sum of the contention upon this defence seems to be that the plaintiff asserted that these lands were the lands of this defendant, and threatened to cause them to be sold unless she paid the amount of the judgment that he had obtained, against her. It was contended that this amounted to an estoppel, and that the plaintiff could not gainsay or deny this assertion made by his solicitor, and that the case *The Merchants Bank v. Lucas*, 13 O. R. 520, is an authority for the contention. This is a case in which the learned Judges expressed different opinions, and which is now, as I understand, being taken to the Court of Appeal; and it does not seem to me at all in point here. I do not perceive how the estoppel can be shewn to exist. The general rule is, that fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived. The party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been made with knowledge of the facts, and it (the representation) must be plain and not a matter of mere inference or opinion; and certainty is essential to all estoppels. Now, I cannot but be of the opinion that the contention for the estoppel in this case must fail, for the reason (if there were none other) that the representation relied on, assuming it to have been made, was made to a person who was not ignorant of the truth of the matter. This defendant must be taken to know, as well as the plaintiff could know,

(a) This, as stated in par. 2 of the defence, was under a judgment recovered on December 5th, 1885, by the plaintiff against Annie Kane for \$292.02.



whether or not she was the owner of this land, or what, if any, interest she had in it. Besides, the subject was not one that was new to her. She had professed before to be the owner, had litigated the question with this plaintiff, and had been defeated. I do not think it necessary to pursue this matter any further. I am of opinion against the existence of the estoppel contended for.

Another special defence of this defendant sets up the facts stated in her counter claim.

No attempt was made to prove the title or trust mentioned in the counter-claim. The damages claimed by it were abandoned, and the final contention in regard to it was that the sheriff's sale should be set aside. It was asked that the counter-claim should be amended so as to make it accord with this contention.

It was not disputed that the property was well advertised if the advertisement sufficiently defined the interest to be sold. It was brought to a sale according to the advertisement. The advertisement was read at the sale and the lands in fact sold. They were afterwards conveyed to the purchaser in due and proper form. None of these things were disputed. It was said that the plaintiff's solicitor took too active a part in the conduct of the sale, and it was even urged that the sheriff had surrendered his independent position in respect of the sale to this solicitor, and that the same person was seller and buyer, and that for this reason the sale should be held void. I am of the opinion that the evidence does not show such to be the facts, and that the contention cannot be supported and wholly fails.

It was contended that the sale was bad because the nature of the estate to be sold was not disclosed, and that in consequence of this, as the plaintiff well knew, there were no bidders at the sale except the plaintiff; and that it was the duty of the plaintiff to have the sale adjourned, &c.; but that the plaintiff, on the contrary of this, directed the sale to be proceeded with, and in order to give colour to the proceedings, procured the attendance of what the

defendant is pleased to call "bogus bidders," and thereby contrived to have the lands knocked down to himself, and that the plaintiff so became the purchaser at a gross undervalue.

The plaintiff is a trustee and acting in his representative character, and I think it my duty here to say that in my opinion he should be entirely acquitted of the charge of having any intention, or of having made any effort or endeavour to obtain this property at an undervalue, or to obtain it at all otherwise than as a necessity to save the interests of the *cestuis que trust*, whom he represented; and I may add that in open Court the offer was made that he would convey the land upon being paid the money he had paid for it.

As to the advertisement not defining the nature of the estate or interest to be sold, it does state that the sheriff had seized and taken in execution the lands (describing them), and that these lands and tenements, or the right, title and interest of the defendant therein would be offered for sale by the sheriff, &c. I was not referred to any authority indicating that this is not sufficient, and I am of the opinion that it is sufficient. This advertisement was read at the sale, the plaintiff became the purchaser, and the land were conveyed to him.

As to the charge of the lands having been sold at a gross undervalue. There was evidence that the property is of much larger value than the sum for which it was sold \$950. The evidence of Mr. Cowan places this value about or over \$2500. There are, however, at least two things to be said about his evidence. He judged of the value by what in his opinion was the value of the land, and then what would be the cost of building the houses, and these sums he added together, apparently not making allowance for the age of the houses which are constructed of wood. He was, when he stated the value, under the impression that there were three tenement houses apart from what was called the cottage, and upon being told that there were only two such tenement houses he did not make such a

change in his figures as one would reasonably expect. The examination then went into details, and the witness seemed to me to be making an effort, however innocently, to support his first statement. He had not inspected the property for the purpose of placing a value upon it. I do not think his evidence as to the value, evidence of a strong character at all.

Evidence of the rental of the property was given, from which it might be said upon inference that the value was as great as that placed upon the property by the witness, but I question if such an inference is just in the case of wooden buildings of considerable age. The deputy sheriff, who should reasonably have some knowledge of the value of property in Ottawa, put the value at \$1,700 or \$1,800, if the dower were barred and no litigation or trouble anticipated.

Neither party thought it worth while to have the property valued by a person skilled in matters of valuation, or to give in evidence particulars as to the condition of the buildings. Upon all the evidence I arrive at the opinion that the property is worth perhaps something less than \$2,000, probably about double the amount that it brought at the sale; but then it is to be borne in mind that the right of dower existed, and also the prospect of interesting litigation with these defendants, both of which would have the effect of diminishing the price that any purchaser would be willing to pay; and when I add to these the fact that it is generally understood that property will not at sheriff's sale bring its full value, and that it has, at least, sometimes been said that at a sale under an order of the Court, property is not expected to realize more than within about twenty per cent. of its actual value, I am not disposed to say that this property was sold at such a gross undervalue as to render the sale one that should be set aside. I do not think the evidence shewed that there was any procurement of what was called "bogus bidders," or any scheme or design to lessen the value of the property to enable the plaintiff to purchase at a small price, and

from all that came to light at the trial, I more than question if any greater price could, under all the circumstances, be obtained for the property (subject as it was to the right of dower and what I have before referred to) at a forced sale than was obtained at the sale in question. I do not desire to be understood to intimate that if I were of the opinion that a greater price could be obtained at a forced sale, that of itself would be a sufficient reason for setting aside the sale. On the whole case I am of the opinion that the plaintiff should succeed. I think the defendant fails in all the special defences, and for the reasons stated in the earlier part of this judgment, I think the plaintiff should succeed upon his own case. What the plaintiff asks specifically, is possession of the lands and premises and his costs of suit, and to these I am of opinion that he is entitled.

Judgment for plaintiff for possession of the lands and premises, with costs of the action.

---

NOTE.—As to the contention of counsel for the defendants that in cases where conveyances are set aside as fraudulent against creditors the rights of the parties cannot be worked out under the course adopted in the former suit *McGee v. Kane*, followed by a sale under the execution in the hands of the sheriff, and that for this alleged reason the practice is not justified, the case of *The Bank of Upper Canada v. Thomas*, 2 E. & A. 502, especially the judgment of the late Chancellor Van-Koughnet and the cases there referred to, may be looked at. No doubt there are later cases also.



## [CHANCERY DIVISION.]

## PARKER V. MAXWELL ET AL.

*Free grant—Locatee—Timber—Licensee under the Crown—R. S. O. ch. 24, secs. 10, 11, 12—43 Vic. ch. 4, secs. 1, 2, 3, (O.)—Clearing—Building.*

Where a locatee of lands, in clearing a portion thereof, reserved twenty-six pine trees thereon, thinking that they would be useful for building, but had previously erected a permanent house and stable, and put up fences, and had enough timber left for building a barn without reserving these trees.

*Held*, that by thus reserving these trees, the locatee left them the property of the Crown, and a licensee of timber under the Crown had a right to cut and remove them.

Where a locatee of lands left certain trees standing temporarily on a certain portion of the land which he was in process of clearing, intending first to burn the fallow and then to cut them down.

*Held*, that a licensee of timber under the Crown, had no right to interrupt the locatee in clearing the lands and to cut and remove such trees. The meaning of 43 Vic. ch. 4, (O.) is, that all standing pine belongs to the Crown; when cut during the process of actually clearing the land for cultivation, or in order to build and fence on the location, it belongs to the locatee; otherwise when cut it still continues the property of the Crown.

THIS was an action brought by W. R. Parker against F. B. Maxwell, Ralph Maxwell, and Richard McBrine, for damages for entering the plaintiff's lands and taking and carrying away timber therefrom, and converting the same to their own use. The timber had been cut while the plaintiff was locatee of the lands and prior to the issue of the patent to him.

In their statement of defence the defendants set up a license to cut timber, issued by the Commissioner of Crown Lands for Ontario to F. B. Maxwell, whose servants or agents the other defendants had been in the matter.

The facts of the case are sufficiently stated in the judgment of Boyd, C., *infra*.

The action was tried at Barrie on March 16th, 1887, before O'Connor, J.

At the close of the evidence counsel for the plaintiff stated that they agreed that the amount he was entitled to recover as damages for the value of the timber, if he was entitled to recover anything, was \$150; and \$100 damage

in the taking and removing if in like manner he was entitled to recover anything therefor; and his Lordship then entered a verdict and judgment for the plaintiff for \$250, stating that he would leave the Court to deal with the whole subject.

The defendants thereupon served a notice of motion by way of appeal to the Divisional Court to set aside the verdict and judgment and to enter judgment for the defendants, on the grounds that upon the pleadings filed, and evidence taken, the verdict and judgment should have been for the defendants.

The matter came up for argument on June 16th, 1887, before Boyd, C., and Ferguson and Robertson, JJ.

*Lount*, Q. C., for the defendants. The plaintiff has cleared and has chosen to leave trees standing on the cleared portion, and says the defendants cannot touch these: R. S. O. ch. 24, secs. 10, 11 and 12; R. S. O. ch. 29, sec. 12; 43 Vic. ch. 4, secs. 1, 2 and, 3 (O.), *Cockburn v. The Muskoka Mill and Lumber Co.*, 13 O. R.; 343. Unless completely cleared the licensee is not prevented from going on cleared land. The license goes beyond the Statute as to the position of a locatee of a mining lot who has no right to cut any trees. See 32 Vic. ch. 34, (O.); R. S. O. ch. 29, sec. 12; *Casselman v. Hersey*, 32 U. C. R. 333, 341; *McMullen v. Macdonnell*, 27 U. C. R. 36; *Hughson v. Cook*, 20 Gr. 238.

*Pepler*, for the plaintiff. Sec. 10, sub-sec. 2, gives all timber to the patentee: *Anderson v. The Muskoka Mill and Lumber Co.*, 27 C. P. 180, which led to the amendment of 43 Vic. ch. 4, (O). We are in possession of timber, and the defendants have not shewn any title to take it out of our possession. The licensee had no right to enter on our cleared portions at all. The licensee cannot have larger powers than the Statute gives. *Cockburn v. The Muskoka Mill and Lumber Co.*, 13 O. R. 343, applies. If this clearing by the plaintiff was going on *bonâ fide* the defendants had no right to enter as upon an

uncleared portion, which must be construed, according to the popular meaning, to mean a part in process of clearing. The license does not give any absolute property, but only a conditional power to cut. The land is the plaintiff's property. If the plaintiff had severed the timber there could be no question. Where is the line to be drawn? Suppose a man kept a tree for his garden, could the licensee come in after eight years and cut it down. See latter part of secs. 2 and 3 of 43 Vic. ch. 4. The patentees shall not cut beyond the limit of the actual clearing. It does not require trees to be actually cut to give them to us as locatees: *Dunkin v. Cockburn*, 13 O. R. 254, at pp. 265-6.

*Lount* in reply. The argument that the plaintiff has title to the timber because he may require it would enable him to cut all the timber. The timber is really what he has cut, not what he may cut. We might deprive him of timber necessary for building and fencing, but the evidence shews that there was plenty left after our license had expired. Besides the plaintiff should do his fencing and building during the period of location, and not afterwards.

June 29th, 1887. *BOYD, C.*—The question in this action is as to the right to cut and remove certain pine trees which were upon lots located as free grants to the plaintiff in January, 1881. The trees were cut and removed by the defendant, F. B. Maxwell, who had a license to cut pine thereon running from July 2nd, 1885, to April 30th, 1886. The timber in question consists of 26 and 55 pine trees all cut by the defendants before the patent issued to the plaintiff, which was some time in March, 1886. The plaintiff did not comply strictly with the terms of settlement, but the Crown waived punctual performance, and issued the patent as a free grant. The 26 trees were cut and removed from a clearing of 26 acres, which had been chopped and underbrushed in the winter of 1882-83, and in the summer of 1884 it was logged, burned, and cleared ready for cultivation. In 1885 a crop of oats was put in this clearing, and it was at the same time seeded down for a meadow.

The 55 trees were on another plot of 10 acres, which had been chopped in the winter of 1884-85, but it had not been logged or burned at the time the defendants took the pine from off it. The plaintiff says that he concluded to leave these 55 trees there till the fallow was burned, as if he chopped the pine down and burned the fallow it would spoil the pine. His intention was apparently to dispose of these 55 trees, but that was frustrated by the action of the defendants. As to the other 26 trees, he reserved them because he "calculated they would come in handy for building." It appears that before this time the plaintiff had erected a permanent house and stable, and had put up fences on the land. He had not built a barn, but after taking this particular timber there was enough left for the construction of a barn.

The object of the Legislature as to free grants of public lands is on its face of a two-fold character: on the one hand to induce and expedite actual settlement in the remoter parts of the Province, and on the other to secure a source of revenue from the sale of timber limits in the free grant territory. The rights of the lumberer under his license need not conflict with those of the locatee doing his settlement duties and otherwise clearing and cultivating the land. Most of the terms and conditions to be found in the statutes now in force respecting free grants are but reproductions of the Crown Lands regulations of earlier years, which were framed in view of the practicable and ordinary course of settlement. The provisions as to clearing are to be understood by reference to the usual way of getting wild or wooded tracts brought into the condition of fallow and arable lands. In Mrs. Traill's books there is frequent mention made of the yearly routine which was more or less observed by the plaintiff in this case. First of all, in the autumn there was the underbrushing, by which small trees and brush were cut close to the ground and thrown into heaps. Then in the winter came the chopping of the large trees. This chopping might involve not only the felling of the tree but the cut-



ting of it up into logs or lengths so as to be more readily handled. In the ensuing or the following summer the whole was fired, and as far as possible consumed. Anything left was submitted to the final process of "branding," by which the brands and charred remains were brought together and reduced to ashes. The characteristics of the clearing process were, therefore, felling and firing. No trees were left standing except, perhaps, a rare shade tree, saved with difficulty from the flames. The lands selected for settlement were as a rule those which produced hard wood, and there is an allusion to this in the statute which requires the applicant to swear that the land for which he applies is suited for settlement and cultivation, and is not valuable for its pine timber: 43 Vic. c. 4, sec. 1, (O).

This Act provides that all pine trees growing or being upon any land located as a free grant shall be considered as reserved, and shall be the property of the Crown, except that the locatee may cut and use such trees as may be necessary for the purpose of building and fencing on the location, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation. Beyond the limits of the actual clearing the locatee is not to cut any pine unless it be for building and fencing: *Ib.* sec. 2. This in brief is the meaning: all standing pine belongs to the Crown; when cut during the process of actually clearing the land for cultivation, or in order to build and fence on the location, it belongs to the locatee; otherwise when cut it still continues the property of the Crown. The statute having regard to the usual course of operations by settlers does not contemplate any reservation of trees which are left standing or uncut during the process of clearing. Where the clearance is, all are to be removed, and as to all pine in the clearance so removed the Crown waives its rights in favour of the locatee. But it is not competent for the locatee to leave pine uncut upon his clearing with a view of having a timber reserve for future building or fencing purposes, so as thereby to oust the superior title of Her Majesty. The statute provides

for the primary needs of the new settler on free land and lets him take pine for the purpose of building and fencing. That does not refer to all future time, but chiefly, if not entirely, to the necessity that is imposed upon the locatee to put up a habitable house, and by necessary implication to provide other buildings to shelter his cattle and produce, and to build fences to protect his annual clearings. In this case the plaintiff was in possession four years and a half before the Crown issued the license affecting these lands. There was ample time for him to get all proper buildings erected on the land, and the facts and pleadings do not present for determination the point adverted to by Wilson, C.J., in *Dunkin v. Cockburn*, 13 O. R. 266, where he remarks that the locatee would have the right as against the licensee to restrain him from cutting more pine trees than would leave sufficient for the purpose of building and fencing on the land.

As to the 26 trees, it appears that the plaintiff did not "require to remove" them (to use the expression of the statute) in the process of clearing, because he left them standing after the field was in crop as a reserve for his own purposes. He did not clear clean, but discriminated against having them cut by ordering them to be left standing, but by doing so he left them the property of the Crown, and failed to do the act by which he might have converted them to his own use.

As to the other 55, different considerations arise when the language of the license issued to the defendant F. B. Maxwell is applied to the facts of this case. One clause in that license provides that "persons settling under lawful authority or title within the location hereby licensed shall not in any way be interrupted in clearing and cultivation by the said licensee." It was apparent on the land that the locatee was in process of clearing the 10 acres on which these pines were standing. The plaintiff also objected at the time, and warned the defendant's men against cutting and removing this pine. In the ordinary mode of clearing these pines would require to be removed before the clear-

ance was actually effected, and it was an interruption of the plaintiff's work on this clearing for the licensee to enter and cut the pine in question. This area had been marked for clearing and the work had gone on to a certain point and then a pause took place in order to burn at a suitable time. There is no evidence of any improper or unreasonable delay on the part of the settler as to the clearing of these 10 acres, and if not he is not in any way to be interrupted by the licensee. If the clearing had been completed and cultivation had gone on with the pine trees left standing, that would have warranted the defendant in dealing with these 55 as with the other 26.

But the difference is, that in the one case the clearing was completed and cultivation had begun: in the other the land was being actually cleared according to the ordinary methods, and any interference on the part of the defendant was unwarranted by his license. The parties have agreed that in case the plaintiff should be found entitled to anything, judgment should be for \$150 as for value of the pine and \$100 as for damages in taking and removing. The plaintiff should also get his costs of action.

FERGUSON and ROBERTSON, JJ., concurred.

Counsel for the defendants applied for leave to appeal, which was granted.

REP.

---

## [CHANCERY DIVISION.]

## THE CATHEDRAL OF THE HOLY TRINITY

## V.

## THE WEST ONTARIO PACIFIC RAILWAY COMPANY.

*Railways and Railway Companies—Expropriation by railway company of part of block of land acquired for specific purpose—Liability to take the whole—Right to exercise option after taking possession—Damages—R. S. C. ch. 109, sec. 100, cl. 2.*

The plaintiffs were incorporated under 37 Vict. ch. 91 (O.) for the purpose of building a cathedral, and were the owners of a block of land enclosed within one fence, and bounded on three sides by streets, known as the Cathedral or Chapter House Block, upon which they had erected a Chapter House as part of the Cathedral, and had leased other portions, but for want of funds the other part of the Cathedral was not proceeded with for some years.

The defendants, in constructing their railway, required part of the block, which would cut off a part of the Cathedral, when erected, for their line, and took possession of it, but the plaintiffs, under the circumstances, declined to sell, or convey, or arbitrate as to the value of anything less than the whole block.

In an action to compel the railway to take the whole and desist from their proceedings as to part only, it was

*Held*, That the block of land was set apart for Cathedral purposes, and had not, by any default of the plaintiffs, lost that distinctive ecclesiastical character, and an injunction was granted against the railway taking a part only, as in *Sparrow v. The Oxford, &c., R. W. Co.*, 2 D M. & G. 94.

It was also contended by the plaintiffs that the defendants having taken possession could not withdraw, but must not take the whole block.

*Held*, that the mere going into possession of part, although a high-handed act on the part of the defendants did not necessarily commit them to the purchase of the whole, and that the defendants should have the option to take the whole or withdraw, and pay all damages and costs sustained by the plaintiffs.

THIS was an action brought by the plaintiffs to restrain the defendants from taking *a part only* of the Cathedral block in the city of London for the purposes of their railway.

The statement of claim set out the incorporation of the plaintiffs under 37 Vic. ch. 91, (O.), and that they were the owners of the land in question: that before the construction of the defendants' railway was authorized, the



plaintiffs had erected a Chapter House on the said premises as part of the cathedral referred to in the said Act of incorporation, which building and land formed an entire messuage building and property, and were known as the Cathedral or Chapter House block: that the defendants were incorporated under 49 Vic. ch. 70, (D.), and were subject to the Consolidated Railway Act of 1879, and Acts amending it: that the defendants in pursuance of powers conferred upon them by said statutes, without leave or license, took possession of part of plaintiffs' said land, pulled down fences, cut down trees, and made a cutting and embankment thereon: that when they so took possession they served a notice on the plaintiffs [setting out the usual notice to arbitrate under the Railway Acts for  $\frac{445}{1000}$  of an acre, part of said cathedral block, and an offer of \$3,000 as compensation]: that the plaintiffs served a counter-notice under The Consolidated Railway Act of 1879 and amending Acts, and particularly under sec. 15 of 47 Vic. ch. 11, that they declined to sell or give possession or proceed to arbitration upon such part of the land, but were willing to sell the whole: that notwithstanding such counter-notice the defendants insisted upon taking only such part of said land, and proceeded with the construction of their railway across said property, and would not take or pay for or arbitrate as to more than such part: that the whole of said block of land and buildings thereon formed one house or building within the meaning of The Consolidated Railway Act of 1879 and the amendments thereto, and the plaintiffs were able and willing to sell the whole but unwilling to sell a part only; and the statement of claim asked for a declaration that the defendants were bound to purchase the whole block, and for a mandatory order directing the defendants to take the necessary proceedings to entitle them to the whole, and to fix and pay the value thereof, and an injunction restraining the defendants from proceeding under their notice served as to part of the block.

The statement of defence denied that the part required by defendants formed part of a house, or other building, or manufactory within the meaning of the statutes in that behalf: alleged that the plaintiffs had abandoned their intention of erecting a Cathedral upon the lands in question, and asserted that the plaintiffs were not able and willing to sell and give possession of the whole of the lands.

The action was tried at the Spring Sittings at London on March 10th, 1887, before Boyd, C.

It appeared at the trial that the Chapter House had been built in 1873, but no other part of the Cathedral had been afterwards erected, nor funds collected for the purpose. The project had, however, never been abandoned, and merely remained in abeyance for want of funds, but no intention of proceeding with it in the near future was shewn.

*Hellmuth*, for the plaintiffs. The portion of land which the railway require by their notice is a part of the house or cathedral building, being part of the actual site of the proposed Cathedral. Indeed by the Act incorporating the plaintiffs, 37 Vic., ch. 91, (O.) the whole of this block of land is designated and set apart as a site for cathedral buildings. In *Lord Robert Grosvenor v. The Hampstead Junction R. W. Co.*, 1 DeG. & J. 446, and 3 Jur. N. S. 1085, it was held that the portion of land which was intended to be a garden in front of unbuilt almshouses was a part of the house or centre building already erected; and here the plaintiffs' case is stronger as part of the actual site of the intended Cathedral is taken. The Canadian statute is practically identical with sec. 92 of the Land Clauses Consolidation Act, 8 Vic. ch. 18, and the English authorities therefore govern here. See *Trimble v. Hill*, 5 App. Cas. 342, and *Catterall v. Sweetman*, 9 Jur. 951. As to the meaning of the word "house," &c., in the statute, see *Richards v. Swansea*

*Improvement and Tramways Co.*, 9 Ch. D. 425. A church is a house, being held so in criminal cases such as burglary, &c., and in the *Corporation of Folkestone v. Woodward*, L. R. 15 Eq. 159, where the word "house," only, was used, this designation was considered sufficient to cover a church. There has been no abandonment of the Cathedral scheme by the plaintiff corporation; this is clearly shewn by their official acts as recorded in their minutes. The personal opinion or conduct of members of the corporation cannot affect the matter. See judgment of Sir John Romilly, M. R., in *The Mayor of Brecon v. Seymour*, 26 Beav. 548. As to acts that have been held not to constitute abandonment, see *Alexander v. The Crystal Palace R. W. Co.*, 30 Beav. 556; *Gibson v. The Hammersmith and City R. W. Co.* 9 Jur. N. S. 221, and *Barnes v. Southsea R. W. Co.*, 27 Ch. D. 536. As to plaintiffs not being willing and able to convey the whole of the lands in question, it is submitted that under the Act incorporating them they have the power of sale; but even if they were an ecclesiastical corporation under disability, and a part of what is legally their house is required by the defendants, they have power to sell the whole; this point was expressly decided in *Governors of St. Thomas's Hospital v. Charing Cross R. W. Co.*, 1 J. & H. 400. As to desistment. This right to desist is now at the trial for the first time claimed by the defendants; it is not raised by the pleadings, and it is contended that after possession has been taken it is too late for retreat: *Marson v. London, &c., R. W. Co.*, L. R. 6 Eq. 101 and S. C. 7 Eq. 546. In *Grierson v. Cheshire Lines Committee*, L. R. 19 Eq. 83, where defendants were permitted to desist, possession had not been taken, and in *King v. The Wycombe, R. W. Co.* 28 Beav. 104, the then Master of the Rolls in delivering judgment, says, "I am of opinion they were entitled to abandon their notice to take, at any period before they actually took possession of the property." Here, there is no question that the defendants have taken possession and been in occupation of the land for some weeks.

*W. R. Meredith*, Q.C., and *Cronyn*, for the defendants. The plaintiffs' only remedy, if any, is for an injunction to restrain the defendants taking part of the property, but they cannot compel the defendants to take the whole: *King v. The Wycombe R. W. Co.*, 28 Beav. 104. As to the defendants desisting, see R. S. C. ch. 109, sec. 8, sub-sec. 26. The company may desist after taking possession: *Grimshawe v. The Grand Trunk R. W. Co.*, 15 U. C. R. 224. The only trust was to erect a Cathedral, and there can be only one Cathedral in the Diocese, and that is under the control of the Bishop, and his evidence shews that he has abandoned this Cathedral for St. Paul's. The plaintiffs have asked the defendants to take more than the plaintiffs can give: *Pulling v. The London, &c., R. W. Co.*, 3 DeG. J. & S. 661. The plaintiffs have divided and leased the premises, and that which is separately leased cannot be taken to be part of the "house" within the meaning of the Act.

*Hellmuth*, in reply. There is no power now to desist. The defendants took possession in a high handed manner, and have done work so that it is too late to replace the plaintiffs *in statu quo*: *Cripps's Law of Compensation*, 2nd ed., 67; *King v. The Wycombe R. W. Co.*, 28 Beav. 104, 106. The leases are all consistent with the main Cathedral project.

April 6, 1887. *BOYD, C.*—Clause 2\* of sec. 100 of the Dominion Railway Act reads thus: "No person shall at any time, be compelled to sell or convey or give possession of, to any company, a part only of any house or other building or manufactory, if such person is willing and able to sell and convey and give possession of the whole thereof:" R. S. C. ch. 109, vol. ii., p. 1512. This language is identical in meaning with, though not literally the same as, the English original to be found in sec. 92 of the Lands Clauses Consolidation Act, 1845, (8 Vic. ch. 18). The terms "house," "building," "manufactory," are to receive, therefore, substantially the same meaning as the English Judges

\*Since repealed.—REF.



have put upon the same words in the section of the Lands Clauses Act. "House" has been held to mean that which is a house both in the ordinary and legal sense, *i.e.*, the house and curtilage and garden and all that is necessary to the equipment of the house. "Building" is held (in extension of the meaning) to include any erection which is in the nature of a house, and so "manufactory" applies to a third class of structure which may be house and may be building and may be something more.

No part of the section is to be so read as to diminish any other part. Each thing described is different from the others, and it is not circumscribed by the description of any of the others: *Per Brett, L. J.*, in *Richards v. Swansea Improvement and Tramways Co.*, 9 Ch. D. 434.

The Dominion Legislature having by 47 Vic. ch. 11, sec. 15, incorporated in our law the provisions of sec. 92 of the Land Clauses Act, the effect is to embody it, as judicially interpreted in England, according to the views enunciated in *Trimble v. Hill*, 5 App. Cas. 342.

To determine the main question now in litigation it is only necessary to refer to two or three cases which shew the scope of the section in circumstances not unlike the present.

The railway was enjoined against taking less than the whole in *Lord Robert Grosvenor v. The Hampstead Junction R. W. Co.*, 1 DeG. & J. 446. They had proposed to take a piece from the corner of land belonging to trustees of almshouses intended to be, but as yet only in part erected, which piece would before completion of the buildings in accordance with the designs have been part of the garden in front of the almshouses. In that case it appears from the report in the Jurist that the building operations had been, as here, suspended for want of funds, (3 Jur. N. S. 1085).

A like case was *Alexander v. Crystal Palace R. W. Co.*, 30 Beav 556, where the land in question lay in front of houses in the course of erection, which land it was intended to attach to the houses as gardens.

*Governors of St Thomas's Hospital v. Charing Cross R. W. Co.*, 1 J. & H. 400, was the case of taking a part of the detached wing of a hospital and the garden of the hospital, although both were modern additions to an ancient edifice. See, also, *Cole v. West London, &c., R. W. Co.*, 27 Beav. 242.

The defendants have taken a strip of land, from the south-west side of the "Cathedral block" in the city of London, which is described and recognised as having that character by 37 Vic., ch. 9, (O.) being an "Act to incorporate the Cathedral of Holy Trinity of London." The whole property is enclosed by one fence and is bounded on three sides by public streets. Upon the property is erected the Chapter House, which was intended to be a part of and united to the Cathedral building proper. Upon the delineation of the ground plans the strip taken by the railway will cut off a part of the projected main edifice, so that the contemplated scheme will be directly interfered with by the invasion of the railway. The Act incorporates the Bishop and the Dean, Archdeacons, and Canons for the time being of the Diocese of Huron; that is to say, the Bishop and Chapter form the corporation, and the part of the building already erected is for the Chapter House. This is an adjunct to the Cathedral and is in the statute regarded and treated as the commencement of the erection of the cathedral buildings. The Chapter House is the place of meeting and for the use of the clergymen and others who with the Bishop form a diocesan body, and it appears to be necessary to give completeness to the constitution of an Episcopal See.

The Cathedral is the Bishop's church, outwardly indicated by his official seat (*cathedra*) being placed there. Such is the present position of the Chapter House, which was established as "The Pro-Cathedral" by Bishop Hellmuth, and no alteration has been since then made in this regard, though a change is contemplated by the present Bishop by which the dignity is to be transferred to St. Paul's Church. Such a change, however, is not final, and the original purpose, contemplated by the statute, may be

hereafter resumed by any incumbent of the Episcopal office. I must, in law, regard this block of land as set apart for cathedral purposes, on which there is already erected part of the cathedral buildings, and which has not by any act or default of the corporation yet lost this distinctive ecclesiastical character.

The present occupation of parts of the Chapter House and of the grounds is quite consistent with the ultimate purpose of the corporation, and all the holdings and tenant arrangements are in subordination to the main scheme for which the block is held under the statute. On this first point my conclusion is against the railway.

The next question is, as to the form of relief. The plaintiffs insist that the company cannot withdraw or desist, but must be compelled to take and pay for the whole cathedral block. I am not able so to view the position of the parties, and though the railway has taken possession of the land and done some work thereon, I think they have yet the right to resile.

The point would be plain enough if the company had not entered upon the land.

In *King v. The Wycombe R. W. Co.*, 28 Beav. 104, notice having been given to take part by the company, and the owner requiring the company to take the whole, it was held that the company might abandon the notice and refuse to take any part, the owner not having been in the least disturbed. That case is not cited, but the same result is reached in *Grierson v. Cheshire Lines Committee*, L. R. 19 Eq. 83, where Bacon, V. C., explains the earlier decisions in *Marrison v. London, &c., R. W. Co.*, L. R. 6 Eq. 101, and S. C. 7 Eq. 546, upon which the plaintiffs relied before me. But the mere going into possession, which appears to have been a high-handed act on the part of the railway, should not necessarily commit them to the purchase of the whole. The entry had reference only to a desire to purchase the strip delineated on the plans—no more. Had the plaintiffs accepted the notice to arbitrate for this, there would have been a consensus as to the quantity. But the plaintiffs

reject the offer and make the counter-claim that all should be taken, or none. To this the company send a refusal, so that the parties were not at one, and it would be an arbitrary proceeding to declare that the company must now purchase the whole whether they will or not.

The option to take the whole still remains with the company. If they do not upon the declaration I now make that the plaintiffs were not compelled to sell part, elect to take the block, they must withdraw and pay all damages and costs, sustained by the plaintiffs—to be ascertained by the Master. This election to be made in ten days after judgment. Apart from the equitable view in which I have placed the matter, I think that the clause as to desistance, sec. 8, sub-sec. 26 (p. 1469), applies with peculiar propriety to such a state of facts as we have here.

In *Grimshawe v. The Grand Trunk R. W. Co.*, 15 U. C. R. 224, Robinson, C. J., thought that there was power to withdraw even after possession taken; *a fortiori* should this be permissible where the possession is of merely a part, and having reference only to that part, and it is proved that the proprietor objects to the company having that part unless on condition of taking the whole.

The objection that the plaintiffs are unable to convey is answered by the case in 1st J. & H. 410, and coupled with the declaration there will be an injunction against taking part only, as in *Sparrow v. The Oxford, &c., R. W. Co.*, 2 DeG. M. & G. 94.

Costs to the plaintiffs, and if necessary a reference as to damages.

G. A. B.

---

NOTE.—Sub-section 2 of section 100 of "The Railway Act," R. S. C. ch. 109; 47 Vic., ch. 11, s. 15 (D.) has been repealed by 50 & 51, Vic., ch. 19, s. 4 (D.)—REP.



## [CHANCERY DIVISION.]

## STUART V. GROUGH ET AL.

*Demurrer—Action in name of receiver.*

S. recovered a judgment against S. S. and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate which he was entitled to under the will of the latter. The share not being paid over plaintiff brought action in his own name against the father's executors to recover the amount. The defendants demurred on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action.

*Held*, that the right of action was in S. S. and not the plaintiff: by his appointment the plaintiff became entitled to receive the amount, and the defendants, the executors, having notice of his appointment could not safely pay over the money to any other, and in case of their refusal to pay, the plaintiff's duty was to apply for leave to bring an action in S. S.'s name.

*McGuin v. Fretts*, 13 O. R. 699, cited and followed.

THIS was a demurrer to the statement of claim in an action brought by Alexander Stuart against Isaac Grough and James Sault.

It appeared by the statement of claim that the defendants were the executors of one James Sault, deceased, under whose will one Samuel Sault was entitled to the sum of \$541.91: that one James Simpson was a judgment creditor of Samuel Sault and the plaintiff had been appointed the receiver in the suit of *Simpson v. Sault*, for the purpose of receiving Samuel Sault's share of James Sault's estate: and this action was brought by him to recover the amount from the executors.

The defendants, besides setting up other defences, demurred to the plaintiff's statement of claim on the ground that the right of action, if any, was vested in Samuel Sault, and that the plaintiff, although he was such a receiver, could not bring it in his own name.

The demurrer was argued on May 4th, 1887, before Robertson, J.

*Moss*, Q. C., for the demurrer. The receiver cannot maintain this action in his own name. He might bring it in the name of the person entitled to the benefit from the testator's estate, but he can only do that upon obtaining the leave of the Court. The suit should be brought in the name of James Sault. No leave has been obtained. The matter is disposed of in the case of *McGuin v. Fretts*, decided at the last sittings of the full Court.\* See *Dickey v. McCaul*, 14 A. R. 166. In *Campbell v. Lapan*, 19 C. P. 31, Mr. Justice Gwynne points out the duties of receivers. I refer also to *In re Hopkins*, *Dowd v. Hawtin*, 19 Ch. D. 61, and *Yeager v. Wallace*, 44 Penn. 294.

*Mackelcan*, Q. C., contra. The receiver is appointed by way of equitable execution to recover judgments. Here a judgment is to be recovered, and James Sault certainly would not allow his name to be used to recover his own money for the benefit of another. If such a consent were necessary, it might never be got at all, and so the receiver would be powerless. See last clause of judgment in *Hills v. Reeves*, 31 W. R. 209. See also *Ex parte Harris*, *In re Lewis*, 2 Ch. D. 423; *Re Morphy*, *Morphy v. Niven*, 11 P. R. 321. As to leave of the Court: *Re Neill*, *Dickey v. Neill*, 9 P. R. 176. The receiver here is in a different position from the receiver of an estate or a partnership where several are interested; there it might be necessary to get leave as so many are interested; but here only one person is interested, and he risks the costs himself: *In re Babcock and Brooks*, 9 U. C. L. J. 185; *Pitt v. Snowdon*, 3 Atk. 750; *Bennett v. Robins*, 5 C. & P. 379.

*Moss*, Q. C., in reply. The paragraph of the statement of claim demurred to does not shew that this receiver is appointed in any different manner than the usual one. *Hills v. Reeves*, *supra*, cited by my learned friend, is referred to and distinguished in *McGuin v. Fretts*.

May 18, 1887. ROBERTSON, J.—This action is brought by the plaintiff as the receiver of the share of one Samuel

\*Since reported 13 O. R. 699.—Rep.

Sault, who is a legatee under his late father's will, of which the defendants are executors. The amount ascertained to be due to Samuel in the month of August, 1886, is \$541.91, as appears by the accounts of the estate of the testator as made up and stated by the defendants. One Simpson recovered a judgment against Samuel Sault in August, 1886, in this Division, and in that suit the now plaintiff was appointed receiver of the share of the said Samuel in the said estate.

The defendant demurs, on the grounds that it appears from the statement of claim that this plaintiff is not entitled to maintain or prosecute this action against the defendants, and that the cause of action (if any) in respect of the matters alleged, is vested in Samuel Sault, and the plaintiff has no title to sue in respect thereof, &c.

In my judgment the objection is well taken. It does not appear even that the plaintiff is proceeding by leave of the Court or a Judge, but that would not help him if it did so appear. The right of action is in Samuel Sault and not the plaintiff; by his appointment he became entitled to receive the amount found due to Samuel Sault from his late father's estate, and the defendants, the executors, having notice of plaintiff's appointment, could not safely pay over the money to any other. And in case of their refusal or neglect to pay to the plaintiff, then the plaintiff could apply to the Court or a Judge for leave to bring an action for its recovery in the name of Samuel Sault. The plaintiff has no right of action in his own name on the facts disclosed in these pleadings, but he has the right, by leave of the Court, to the use of Samuel Sault's name to enforce payment; but that leave must always first be obtained. The Court have always been very particular on this point, even if an action is brought against the receiver for any thing done by him in the performance of his duty as such, it is necessary for him to apply to the Court for leave to defend the action, otherwise he will not be allowed the costs of unsuccessfully defending: *Swaby v. Dickon*, 5 Sim. 629.

In cases of distress for rent, it is the practice of the Court to allow receivers to distrain upon an affidavit setting forth the amount of rent, the name of the tenant, and that his rent is in arrear, &c. ; but even in that case the order is, that the distraints be made in the name of the person in whom the legal estate in the land is vested ; unless it happens that the tenant has previously attorned to the receiver, in which case he can distrain in his own name. The plaintiff in this case having been appointed by the Court receiver to collect the share of Samuel Sault due from his late father's estate, could, on receipt of the amount, give a proper discharge of the claim to the executors, but when it becomes necessary to litigate in order to recover the amount, it must be done in the name of Samuel Sault, he being the only person having title to recover at law.

In *McGuin v. Fretts*, lately decided in this Division of the High Court, but not yet reported, the Chancellor in giving judgment, says : "The receiver is no more than an officer of the Court who becomes custodian of the assets when received, and has no right to sue in his own name for a debt. \* \* \* The usual practice is in proper cases to direct the action to be brought in the name of the creditors: *Dacie v. John*, McClel. 575. If there is no person in whose name the action can be brought, it may be that there would be jurisdiction to direct the action to be in the name of the receiver as was suggested by Jessel, M. R. in *Hills v. Reeves*, 31 W. R. 209, and as appears to be also indicated by the Irish M. R. in *Acheson v. Hodges*, 3 Ir. Eq. R. 522. But apart from special circumstances, I find no authority for giving permission to the receiver to sue in his own name in respect of a right of action which is vested in another."

Mr. MacKelcan cited in support of his contention *Hills v. Reeves*, above referred to, but in that case, as pointed out by Boyd, C., in *McGuin v. Fretts*, "the controversy arose between receivers—one of them having done wrong by the removal of important documents, the Court allowed



the other receiver to sue the wrong-doer therefor." In *Ex p. Harris, In re Lewis*, 2 Ch. D. 423, also cited by Mr. MacKelcan, the facts were altogether different from those in this case. There the action was brought to recover the balance due on a bill of exchange which had been endorsed over to the plaintiff, who was a receiver, in part payment of a quantity of oats sold by him as an auctioneer at a sale held by him of property forming part of the estate of the testator: Harris having been appointed receiver by the Master of the Rolls, in the Chancery Division of the High Court, for the administration of the estate of Benjamin Sillence, deceased, the testator. He claimed, therefore, as the holder of the bill, it having been endorsed over to him. No one else could sue: it is true he held it as receiver, but by virtue of it being indorsed over to him, he was the person in whom the right of action was vested, and consequently he had the right to sue in his own name. I think, however, that while I must allow the demurrer with costs, it is a case in which the plaintiff should be allowed to amend by adding the name of Samuel Sault as co-plaintiff, the present plaintiff having sufficient interest to remain a co-plaintiff in as much as he represents the creditors of Samuel Sault, and has the right to receive the amount due to him from the defendants as executors of his late father's estate, and for the reasons given by the Chancellor, in *McGuin v. Fretts*, it will be unnecessary to direct that security for costs should be granted.

Judgment will, therefore, be in favour of the defendants on the demurrer, with costs, with leave to the plaintiff to amend, as he may be advised, by adding the name of Samuel Sault as a co-plaintiff, on payment of costs of demurrer.

G. A. B.

---

## [CHANCERY DIVISION]

## PRATT V. THE CORPORATION OF THE CITY OF STRATFORD.

*Municipal corporation—Jurisdiction over streets—Absence of by-law for the work—Damage to adjacent owners—Remedy by action or arbitration—46 Vic. ch. 18 (O.).*

The plaintiff, who was the owner of certain premises which were "injuriously affected" by the raising of the street by the defendants in rebuilding a bridge and its approaches, brought an action for damages.

*Held*, that he could not avail himself of the absence of a by-law for the construction of the bridge in order to proceed by way of an action for damages and that his remedy was under the arbitration clauses of the Consolidated Municipal Act, 1883, (46 Vic. ch. 18 (O.)) for compensation.

An owner of land has by common law no vested right to the continuance of a highway at the level it was when he purchased.

The corporation as owners or trustees for the public have the right to repair and in repairing to improve streets and bridges without a by-law for that purpose.

*Van Eymond v. The Corporation of the Town of Seaforth*, 6 O. R. 610, not followed.

THIS was an action brought by John Pratt against the Corporation of the City of Stratford for damages for raising the street or highway in front of his premises in re-building a bridge, and for a mandamus to compel the defendants to lower it to its original level.

The defendants set up their powers under the Municipal Act of 1883, (46 Vic. ch. 18 (O.)) : that it was in discharging their public duties that they built a bridge across the River Avon in the said city of Stratford with proper approaches, walls and railings, which were the acts complained of: that the work was well done and that there was no negligence: and that even if the plaintiff's premises were damaged, as he alleged, his remedy was under sec. 486 of the Consolidated Municipal Act, 1883, 46 Vic. ch. 18 (O.) and not by way of action.

The action was tried at the Spring Sittings held at Stratford on April 29, 1887, before Boyd, C.

The evidence showed that the bridge was a necessity for public travel, the old one having been condemned as unsafe : that in building the new one the street had been raised about three feet in front of the plaintiff's land, by which he was considerably damaged, as the site was rendered almost unfit for a business stand. It was also shewn that no by-law was passed by the defendants for the construction of the bridge.

At the close of the plaintiff's case *Idington*, Q. C., for the defendants took the objection that because the bridge was a necessity, and was properly constructed, the plaintiff had no right of action, but should have proceeded by way of arbitration.

The defendants' evidence showed the necessity for the bridge, and that it was built in a reasonable and proper manner.

During the trial the learned Chancellor held that this action was not founded on negligent construction of the work, and that the plaintiff was not estopped from shewing damage on that ground in another action.

*Cassels*, Q. C., and *Pennyfather*, for the plaintiff. No by-law was passed for the new bridge, or the issue of the debentures : 48 Vic. ch. 72 sec. 14 (O.) The council chose to do the work without it. There is no objection to plaintiff's action. The damage is proved and there should be a reference. A landowner has no right to arbitrate until after a by-law is passed. Sec. 393 Consolidated Municipal Act, 1883, provides that those "injuriously affected thereby" cannot do anything until "after passing of the by-law." In *Yeomans v. The Corporation of the County of Wellington*, 4 A. R. 301, there was no by-law, but the corporation assented to the arbitration. *Adams v. The Corporation of the City of Toronto*, 12 O. R. 243, does not apply because a by-law is assumed. See also *West v. The Corporation of the Village of Parkdale*, 12 S. C. R. 250 ; *Van Egmond v. The Corporation of the Town of Seaforth*, 6 O. R. 610 ; judgment of Osler, J. *McGarvey v. The Corporation of the Town of Strathroy*, 10 A. R. 636.

*Idington*, Q. C., for the defendants. There was no necessity for a by-law. The duty of constructing the bridge was cast upon the municipality by the statute 48 Vic. ch. 72 (O.) and they had no option to avoid it. *McGarvey v. The Corporation of the Town of Strathroy*, *supra*, turned purely on a question of negligence. See also *Stonehouse v. The Corporation of the Township of Enniskillen*, 32 U. C. R. 562; *Croft v. The Town Council of Peterborough*, 5 C. P. 141; *Re Yecmans v. The Corporation of the County of Wellington*, *supra*; *Snook v. The Town Council of Brantford*, 14 U. C. R. 255. The plaintiff might be able to compel the passing of a by-law if it was necessary; but without it he can arbitrate. Plaintiff's argument is that in the absence of a by-law there is no right to compensation at all, but that is not the law; because a by-law is not a necessity, *Adams v. The Corporation of the City of Toronto*, 12 O. R. 243. In *re Colquhoun and the Town of Berlin*, 44 U. C. R. 631. Sec. 486, Consolidated Municipal Act, 1883, (46 Vic. ch. 18 (O.)) provides for compensation without there being a by-law, and that section applies to this case.

*Cassels*, Q. C., in reply. If the defendants had built the new bridge in the same place as the old one they would have been right, but they have changed it so as to raise the road and they could not do that without a by-law. They disturbed the *status in quo*. They are not required to raise the road three feet, even though it might be proper thing to do. In *Croft v. The Town Council of Peterborough*, *supra*, there was a statute for "raising and levelling." Sec. 550 Consolidated Municipal Act, 1883, provides for by-laws for altering roads. A by-law is necessary in any interference with private property. If compensation is plaintiff's remedy it should be under a by-law, but if there is no by-law he has a right to sue for damages. Sec. 486 Consolidated Municipal Act, 1883, does not control sec. 393; it does not get rid of the manner in which the powers are to be exercised.

May 27, 1887. BOYD, C.—The plaintiff, as owner of property abutting on the northern approach to the bridge



in Stratford, cannot avail himself of the absence of a by-law for the construction of that bridge and its approaches, in order to proceed by way of action for the damages alleged to be sustained by his property on account of raising of the level of the road before his land. His land is not taken or encroached upon, and he has by common law no vested right to the continuance of the highway at the level it was when he purchased. His land is perhaps injuriously affected to a greater extent than it is benefited by the new bridge, but that state of facts will give him no right of action against the corporation, who are acting for the benefit of the public in the discharge of a statutory duty: *Boulton v. Crowther*, 2 B. & C. 710, Littledale, J.

The corporation had power to pass a by-law for this work, and to raise or lower the street as deemed most suitable for the public convenience. The omission to pass a by-law does not affect their jurisdiction to deal with the street in the interests of the public, when it is made to appear that the old wooden bridge had been condemned as unsafe, and it became imperative to engage in the work of reconstruction. If it was informal or irregular to enter upon the undertaking without the passing of a by-law, that is a matter which does not concern the plaintiff in respect of his land being injuriously affected by the construction of the stone bridge.

I think that the corporation had a right to engage in the substitution of a new and better bridge instead of the old condemned structure, without the formality of a by-law being passed: their jurisdiction does not in the case of existing highways and bridges, which are by statute vested in them, depend on the enactment of by-laws.

They have, as the owners or trustees for the public, the right to repair and in repairing to improve streets and bridges without a by-law for that purpose: *Croft v. The Town Council of Peterborough*, 5 C. P. 45, 46; *Perdue v. The Corporation of the Township of Chinguacousy*, 25 U. C. R. 61; *Buchanan v. The Town of Galt*, 12 C. P. 75; *Lewis v. The Corporation of the City of Toronto*, 39 U. C. R.

343; *Re Yeomans et ux and the Corporation of the County of Wellington*, 43 U. C. R. 522; and affirmed on appeal 4 A. R. 315. See *Angell* on Highways, secs. 202, 211.

In the present instance it was deemed desirable, in the public interest, to put up the most durable kind of bridge in this largely travelled street of the city, and stone was the material selected. This necessitated arching of the bridge which had formerly been a Howe truss bridge built on the level. The inevitable result of this manner of reconstruction was to raise the road about three feet in front of the plaintiff's shop. Such is the nature of the injury which necessarily results from the action of the corporation.

The necessity for the erection of the bridge is recognised and referred to in the statute incorporating Stratford: 48 Vic. ch. 72 (O.) preamble and sec. 17.

There is no complaint that the work was done improperly or negligently, and the whole cause of action, grows out of the *bonâ fide* exercise of the defendants' corporate powers. So that, apart from the statutory provisions as to compensation, the plaintiff has no redress. But that redress is restricted to compensation by mutual agreement, and failing this, arbitration to settle the amount.

The language of Osler, J., in *Van Egmond v. The Corporation of the Town of Seaforth*, 6 O. R. 610, if read in its broadest sense would go to support the plaintiff's action; but so to do would be to run counter to the very plainly expressed opinions of the Judges who decided *Re Yeomans and The Corporation of the County of Wellington*, *supra*, in both Courts. In that case, a bridge being built by the county, it became necessary, some four years after, in repairing the road, to raise it about four feet so as to make it level with the bridge. This was done without any by-law and in performance of what was supposed to be a duty of the county. The injury sustained by Yeomans was similar to that of the plaintiff in this action. In giving judgment Gwynne, J., said: (43 U. C. R. 529) "without prejudice to the claim for compensation, it may be well conceded

that the party injured has no cause of action upon the case, as for a wrong against the municipality."

In 4 A. R. 301, Moss, C. J. O., in stating the case says: 'The appellants in the exercise of their general jurisdiction over roads, and without passing any by-law, had raised the original allowance for road about four feet in front of the premises owned by the respondent.' And in closing his judgment he says, (p. 315) "Now, whence does the corporation of the county derive authority which entitles it to build the embankment \* \* on the highway? Is it not solely by virtue of the jurisdiction with which it is clothed by the statute? It has no inherent right to interfere with high ways, and but for the statute its officers would be mere trespassers in executing their work. By the operations in the exercise of that power, the respondent's land has been injuriously affected, and while the law prevents her from bringing an action against the county it is no longer so unjust as to refuse her compensation." To the same effect is the decision in *Adams v. The Corporation of the City of Toronto*, 12 O. R. 243 and see also the judgment of Burton, J., in *McGarvey v. The Corporation of the Town of Strathroy*, 10 A. R. 636.

In *Re Yeomans and The Corporation of the County of Wellington*, the arbitration was under 36 Vic. ch. 48 sec. 373 (O.) the same as R. S. O. ch. 174 sec. 456 and sec. 486 of the present Act, *i. e.*, (46 Vic. ch. 18 (O.)) That section precisely fits the claim of the plaintiff, and under that alone has he any right of redress.

It was argued that the plaintiff could not initiate an arbitration if no by-law had been passed. That contention rests on the literal reading of sec. 393 of the Act of 1882-3 (46 Vic. ch. 18 (O.)) but if there is no by-law the plaintiff can proceed under sec. 389.

The history of sec. 393 which is traced by Gwynne, J., in *Re Yeomans and The Corporation of the County of Wellington*, 43 U. C. R. 530 *et seq.* will explain the appearance and the continuance in that section of the words "after the passing of the by-law." The section originally was limited

to cases where lands were taken, in which case a by-law was essential to prevent the corporation being regarded as trespassers, but it was amended and enlarged to cover cases of "injuriously affected lands;" the draftsman stopped short of finishing his work by providing in this section for the time of appointing the arbitrator by the injured party where no by-law was needed. It is evident that the point of time fixed "after the passing of the by-law" is intended to meet the case of lands taken, in which case the value can be easily ascertained at the outset; whereas in the case of lands not taken, but merely injuriously affected, the proper point of time for ascertaining the damage would be after the completion of the work: *Macey v. The Metropolitan Board of Works*, 33 L. J. Ch. N. S. 377; *Lister v. Lobleigh*, 7 A. & E. 123

Resort, however, can be had, as I have indicated, to sec. 389 which is general in its terms, and it is better to give a liberal rendering to these arbitration clauses than to hold that the injured party cannot arbitrate, because the proper machinery has not been provided. It would not, however, follow, that he would be therefore remitted to a right of action, on the contrary such a reading of the arbitration clauses would leave him without remedy. The statute declares that any such claim for compensation *shall be* determined by arbitration under the Act, sec. 486, and upon this I may refer to the commentary of Patterson, J., in *Vandecar v. The Corporation of East Oxford*, 3 A. R. 146.

There is, therefore, no cause of action, and the usual result follows of dismissal, with costs.

G. A. B.

---



## [CHANCERY DIVISION.]

## RE DENNIS.

## DOWNEY ET AL. V. DENNIS ET AL.

*Partition—Will—Devise to trustees upon trust to sell if directed by majority of heirs—Consent of majority—Application by minority for partition.*

J. C. died in 1867, having by his will provided as follows : “ And whereas trouble \* \* may arise among my family with regard to the property \* \* on account of its being put out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize at and after twenty years after my death, my trustees \* \* to absolutely sell and dispose of my said property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living, to do so and not otherwise, &c.” In 1887, a meeting of a large majority of those interested was held, and it was decided to sell by public auction.

On an application by the plaintiffs who were trustees for one of the heirs and represented only a one-sixth share of the property for the usual order for partition and sale, which was resisted by a majority of the heirs. It was

*Held*, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted.

THIS was an application made by John Downey and the Rev. Donald H. McVicar, who were trustees for one of the heirs of Joseph Dennis, deceased, for an order, in the usual terms, for a partition or sale of certain property which had belonged to the said Joseph Dennis in his lifetime, and had been devised by his will.

The motion was argued on June 27th, 1887, before Boyd, C.

It appeared by affidavits and depositions filed that Joseph Dennis had died in 1867, having first made his will whereby he gave his lands in the city of Toronto, situated on the corner of King and Yonge streets, being the property in question, to his three sons in trust to receive the rents and profits, to pay his debts, to pay an annuity to his widow, and to divide the balance of the

rents and profits amongst his sons and daughters equally, the children of any deceased child taking the share their parent would have taken ; and that he left three sons, one daughter and two grand-children, the latter being the children of two daughters who predeceased him.

In his said will was contained a clause as follows (24): "And, whereas trouble and discontent may arise among my family with regard to the property which I own in the city of Toronto on account of its being put out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize, at and after twenty years after my death, my trustees, to whom I have hereinbefore devised my Toronto property in trust, or the survivors or survivor of them, or the heirs, executors, or administrators of the survivor of them, to absolutely sell and dispose of my said property in Toronto to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living to do so, and not otherwise ; and the proceeds thereof to be equally divided between them all, sons and daughters, share and share alike."

One Maria Lawrence, one of the granddaughters of the testator, upon the occasion of her marriage, conveyed her share (one-sixth) of the said estate unto the applicants in this matter as trustees of her marriage settlement.

The twenty years period named by the will expired in June, 1887. A meeting was held, at which five heirs and devisees interested were represented, and it was decided to proceed with a sale of the property by public auction, one of the applicants being present at that meeting, although he alleged he did not consent to the sale. The property was advertised for sale, the first notice appearing on the 11th of June, and on the 13th of June the notice of this motion was served.

*James Maclellan*, Q. C., for the plaintiffs. The evidence shews that the course of the trustees in selling now is not a wise one in the interests of the applicants and infants, as the property is in a position to increase in value very

much. A direction to sell can be repudiated by a *cestui qui trust*, and the property may be asked for in specie. The legal estate may be in the trustees under the will, but the equitable beneficial interest is not. In a devise of the proceeds of lands to be sold the devisee can elect to take the land and not the proceeds. My client's legal right is to waive the sale, and require the trustees to convey their share in specie. The usual order for partition or sale should be made.

*J. Hoskin*, Q. C., for the infants, asked that reserve bids should be fixed, and the sale postponed a short time, as many probable bidders were away in the summer, the time fixed for the sale.

*Lash*, Q. C., and *J. R. Roaf*, for the defendants. This application is under order 640, and only the trustees and infants are notified. The plaintiffs have no *status* here, as they take their interest in the estate as personal property; the real estate being vested in trustees to sell and divide the proceeds. The plaintiffs have no such interest in real estate, as is required by the Partition Act. Unless plaintiffs are entitled to a share as realty, the Court has no jurisdiction to order partition. We refer to *Arden v. Arden*, 29 Ch. D. 702; *Biggs v. Peacock*, 20 Ch. D. 200; *Taylor v. Grange*, 13 Ch. D. 223; *Cass v. Wood*, 30 L. T. N. S. 970; *Swain v. Denby*, 14 Ch. D. 326; *Boyd v. Allen*, 48 L. T. N. S. 628, 24 Ch. D. 622.

*MacLennan*, Q. C., in reply. There is a gift of the whole estate to the parties. Where there are active duties to be performed by the trustees under a will they should not be interfered with by partition, but it is otherwise where, as in this case, there are no active duties. Each devisee has a separate defined share here, and should get it in specie if desired. See also *Lewin on Trusts*, 8th ed., p. 953.

June 28th, 1887. *Boyd*, C.—In the first edition of *Jarman on Wills*, 1844, p. 536, 4th ed., p. 601, the author, without citing any authority, gives his view of the law thus: "It

may be observed, that in order to amount to an election to take property in its actual, as distinguished from its eventual or destined state, the act must be such as to absolutely determine and extinguish the converting trust; and hence it would seem to follow, that where two or more persons are interested in the property, it is not in the power of any one co-proprietor to change its character in regard even to his own share; for, as the act of the whole would be requisite to put an end to the trust, nothing less will suffice to impress upon the property a transmissible quality foreign to that which it had received from the testator." In *Lewin on Trusts*, p. 784, 6th ed., p. 957, 8th ed., that author writes thus: "Where an estate is directed to be sold, the proceeds to be divided amongst *several persons*, no one *singly* can elect that his own undivided share shall not be disposed of, but shall remain realty, for the other undivided shares will not sell so beneficially in proportion as if the estate was entire."

That these positions are correct law is recognized by Pearson, J., in *Patten v. Guardians of Edmonton*, 31 W. R. 785, and by Jessel, M. R., in *Biggs v. Peacock*, 22 Ch. D. 284, C. A. 31 W. R. 148, where that great Judge said: "If there is a trust for sale any party equitably entitled has a right to require a sale by the trustees and a distribution of the proceeds." In the same case Cotton, L. J., said: "Here there is a trust for sale, and the very object of that trust is to enable the trustees to sell the property when the period of distribution arrives. \* \* \* Of course where all the beneficiaries are *sui juris*, it is competent for them to agree to put an end to the trust, and to call for a conveyance of the legal estate to themselves. Here they do not agree, and, therefore, the trust still exists," p. 149 of W. R.

To the same effect is the judgment of Mr. Justice Pearson in *In re Tweedie and Miles*, 33 W. R. 133, 27 Ch. D. 315, which held that a trust for sale was not ended by the beneficiaries attaining vested interests in the settled property, and that the trust could be exercised without their concurrence.



These authorities conclude the application against the part owners who apply.

The land in question is vested in the three sons as trustees on the express trust to sell, at the end of twenty years, from the testator's death, provided a majority of the heirs are in favour of a sale. This has been proved, that a sale is desired by a majority; and if so, the jurisdiction to partition is ousted. The persons selected by the testator to sell are proper persons to conduct that sale, and if wrong is being done they will be answerable, or they may be enjoined. But of this I see no evidence at present.

I refuse the application, with costs.

G. A. B.

---

## [CHANCERY DIVISION.]

## PEGG v. HOBSON.

*Mortgage—Action on covenant—Mortgagee becoming owner—  
Extinguishment.*

In an action on the covenant for payment in a mortgage for the amount of the deficiency after the exercise of a power of sale, defendant set up the sale under the power to one W. and a re-transfer by W. on the same day to plaintiff, by which plaintiff became the owner of the land. *Held*, on demurrer, no defence.

This was a demurrer to the statement of defence of the defendant Newton Hobson in an action brought by Wilfred W. Pegg against Newton Hobson and George Hobson, the latter of whom did not defend.

The action was brought by the assignee of a mortgage on the covenants contained in the mortgage made by the defendants to one Samuel McCready Armstrong, and the statement of claim set out the making of the mortgage, and the covenants and assignment to plaintiff, and the sale of the property after default under the power of sale in the mortgage, and alleged that there was a deficiency and claimed the amount of the deficiency.

The statement of defence set out a sale and transfer of the property on May 20, 1887, by the plaintiff to one Thomas J. Woodcock, under the power of sale, and a re-transfer and quit claim on the same day by Woodcock to the plaintiff, by which the plaintiff became the owner of the lands.

To this statement of defence the plaintiff demurred on the ground that the facts alleged therein did not show an extinguishment of the plaintiff's cause of action against the defendant or any ground of defence.

The demurrer came on for argument on the 29th of June, 1887, before Boyd, C.

*E. B. Brown*, for the demurrer.

*W. M. Douglas*, contra.

On the opening of the case defendant's counsel was not present; but the learned Chancellor said he thought it was settled law that the facts alleged by the statement of defence did not constitute any defence, and that the demurrer must be allowed.

He, however, reserved judgment to allow counsel to put in any cases.

*Rudge v. Rickens*, L. R. 8 C. P. 358 and *Fisher on Mortgages*, 4th ed. 958 were referred to on behalf of the plaintiff; and *Parkinson v. Higgins*, 37 U. C. R. 308, 40 U. C. R. 274, on behalf of the defendant.

June 30, 1887. BOYD, C.—The statement of claim shews that default being made in payment of the mortgage moneys by the defendants, the plaintiff as assignee of the mortgaged land and security exercised the power of sale contained in the mortgage, and that the price realized was insufficient to pay him in full. He then brings this action for the deficiency.

This right is recognized by VanKoughnet, C., in *Burnham v. Galt*, 16 Gr. 419, where, he says, if the mortgagee parts with the estate (otherwise than under a power of sale or the like) so that it cannot be restored to the mortgagor, or be held in security for him or his benefit, the latter is discharged from personal liability.

The exercise of the power of sale is equivalent to a sale directed by the Court in a mortgage action, in which the usual course is to make a personal order against the mortgagor for any deficiency: *Turnbull v. Symmonds*, 6 Gr. 615. See also *Gowland v. Garbutt*, 13 Gr. at p. 584.

This action appears to me to be of substantially of such a character. The deficiency only is sued for. That the plaintiff has subsequently acquired the land, cannot impede his right to recover on the covenant, though it may, in certain circumstances, enure to the benefit of the defendant if he seeks to redeem the land by paying all the mortgage money. But that is not the question raised by

the defence, which is here pleaded as a merger, or as a satisfaction of the covenant in bar of the action.

*Parkinson v. Higgins*, 37 U. C. R. 308; and also again reported in 40 U. C. R. 274, is a totally different case; one in which the property mortgaged was sold under proceedings that brought no benefit to the mortgagor; but in this case the security is realized for the purpose of satisfying the claim of the mortgagee, as far as it will go.

The demurrer is allowed with costs, but the defendant may have leave to amend on payment of costs, if so advised.

G. A. B.

---



## [CHANCERY DIVISION.]

## WELLS V. LINDOP (2).

*Slander—Qualified privilege—Bad faith—Malice.*

Where one used defamatory language of another under circumstances of *quasi* privilege, but used the words in bad faith, not believing them to be true :

*Held*, that the expressions must be considered as in excess of the requirements of the occasion and malicious, and he was not protected in an action for damages.

*Jacob v. Lawrence*, 4 L. R. (Ir.) C. L. 582, cited and relied on.

A new trial having been granted in this case as reported 13 O. R. 434, it was again brought down to trial at St. Thomas, on March 14th, 1887, before Galt, J., and a jury.

The action was one for slander, and the facts sufficiently appear from the report in 13 O. R. 434, and the judgment of Ferguson, J., below, the evidence at the second trial being practically the same as at the first, but the defendant now pleading privilege.

The second trial resulted in a verdict of \$350 in favour of the plaintiff, and judgment was accordingly directed to be entered for that amount.

The defendant now moved by way of appeal before the Divisional Court to set aside the verdict and to enter a nonsuit, or for a new trial, setting out the following grounds in his notice of motion: that the occasion on which the words in question were spoken by the defendant was a privileged one; and that there was no evidence whatever that the defendant was actuated by malice in speaking the said words; and that the learned Judge should have told the jury that the question for them to determine was whether the defendant was in fact actuated by express malice, and that if they found he was not that their verdict should be for the defendant; and that the verdict and judgment were contrary to the judgment of the Court rendered in this action (see 13 O. R. 434), and that the damages were excessive.

The motion came up for argument on June 18th, 1887, before Boyd, C., and Ferguson, J.

*Aylesworth*, for the defendant. The circumstances proved shew privilege, and no malice is shewn. The Judge at the trial held that it was for the defendant to shew he was actuated by proper motives, but this is not so: *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495; *Somerville v. Hawkins*, 10 C. B. 581; *Clark v. Molyneux*, 3 Q. B. D. 237; *Odgers*, on Libel and Slander, pp. 269, 280-1; *Pollock* on Torts, pp. 227, 235; *Spill v. Maule*, L. R. 4 Ex. 232; *Woodward v. Lander*, 6 C. & P. 548.

*B. B. Osler*, Q. C., for the plaintiff. The privilege was only qualified or *quasi* privilege. The privilege here was done away with by reason of the excess of language from which actual malice may be inferred, the public occasion on which the words were used, and the hard rough voice and manner. All these are evidence of express malice: *Wilcocks v. Howell*, 5 O. R. 360; *Folkard's Law of Slander and Libel*, 4th ed., p. 283; *Odgers* on the Law of Libel and Slander, p. 239; *Wilson v. Collins*, 5 C. & P. 373; *Oddy v. Paulet*, 4 F. & F. 1009.

June 29th, 1887. FERGUSON, J.—This is an action of slander. There has already been two trials of it. The result of the first trial was a verdict for the plaintiff, and the damages were assessed at \$400. That verdict was moved against and a new trial was ordered with leave, as I understand, to the defendant to amend his pleadings by setting up that the occasion on which the words were spoken, was privileged. The learned Judges, however, do not appear to have entirely agreed as to the necessity of such an amendment: 13 O. R. 434.

The result of the second trial is a verdict for the plaintiff, the jury assessing the damages at the sum of \$350.

This motion is to set aside the verdict and enter a non-suit, or for a new trial. The plaintiff had been in the employment of a company called the Silver Mining Com-

pany, of which the defendant was the president. By some arrangement the plaintiff's wife was to be paid a share of the wages of her husband. Pursuant to this and properly enough, so far as she was concerned, upon meeting the defendant near the post-office in the city of St. Thomas, she asked him for some money, a part of her husband's wages, and according to her evidence and as alleged by the plaintiff, the defendant answered by saying, "We do not owe him anything now. He stole the boat, the cooking stove, and a lot of other things, and sold them."

The defence denies that the words were spoken by the defendant, and also sets up that the occasion on which they are alleged to have been spoken was privileged. The verdict is as before stated. The evidence for the plaintiff is, that the words were spoken by the defendant in a loud rough tone of voice, and within the hearing of others; that is, within the hearing of people other than the plaintiff's wife.

It is indicated in the evidence that a letter had been received by one Mr. Foster who had some connection with the company, containing some information in respect to the property, the boat, cooking stove, &c., in conjunction with the plaintiff, and that this information had been communicated to the defendant. In the defendant's own testimony he says that he recollects the occasion near the post-office, and his being there asked for money by the plaintiff's wife; but upon being asked if he remembered speaking the words that are charged, his answer is, that he never said anything of the kind. In another part of the evidence he says that he has no recollection of speaking the words, or of speaking them in the manner stated by the plaintiff's wife; and that he should have recollected the fact if he had done so. He also says that it was not his way of speaking to any one. He says that he does not recollect that any person was with the plaintiff's wife on the occasion referred to. Upon his being asked as to his belief that the plaintiff had stolen the stuff, he says: "I

was well acquainted with Mr. Wells. He had worked for me, and I had always found him, as far as honesty was concerned, honest with me, and I was very unwilling to believe it; but still we had the letter to that effect." After several other questions, he is asked the question, "Did you believe the letter, on your oath, that this old man had stolen the stuff?" And his answer is, "It is a long time since the letter came; I don't know what my belief was then." Further questions and answers seem to me to show that the defendant was at the trial unwilling to swear that at the time referred to, he entertained the belief that the plaintiff had been guilty of what is charged by the words.

The defendant, as I have said, set up that the occasion was privileged. It was contended at the bar, that owing to the former judgment in the case, it must now be assumed that the privilege did exist; that there was what has been called a *quasi* privilege. The plaintiff's counsel, as I understood his argument, did not contend the contrary of this, but it was contended that there was an excess of language; that the occasion was a public one; that the words were uttered in a loud and rough voice, and that from these malice may, and in this case, ought to be inferred.

Many authorities were referred to by counsel. The law upon the subject seems to be well stated in the case of *Jacob v. Lawrence*, 4 L. R. (Ir.) C. L. at p. 582, by Chief Justice May: "If a person be proved to have used defamatory expressions concerning another, *primâ facie* the law imputes malice to and imposes responsibility upon him. But in case these expressions have been made use of upon certain occasions called privileged, *primâ facie*, the inference of malice is rebutted, and responsibility is avoided. But, even though the occasion may be of a privileged character, the person using such language, may lose the benefit of the privilege and incur responsibility if the tribunal before whom his conduct comes in question, is satisfied that in the defamatory expressions he made, he



exceeded the proper requirements of the occasion, using language of uncalled for virulence, thereby showing that he was actuated by feelings not accounted for by the exigencies of the occasion, and used the language not *bonâ fide* to serve the purposes of such occasion but *malâ fide*, in order to injure the complainant."

In the case *Laughton v. The Bishop of Sodor and Man*, L. R. 4 P. C. at p. 509, Sir Robert Collier, seems to have adopted the language of the Chief Justice, in delivering the judgment of the Court of Exchequer, in *Spill v. Maule*, L. R. 4 Ex. 232, at p. 237, as being a proper statement of the law as applied to the facts of that case: "The presumption of law being in favor of the absence of malice by the defendant, and the only evidence of malice being his description of acts done by the plaintiff, which were capable of a two-fold construction, that presumption of innocence which attaches to the writer, must also, where his act is capable of a double aspect, still attend him. Starting with the presumption of innocence in his favor, we must presume that the defendant did entertain that view of the plaintiff's acts, which induced him to believe and honestly to believe, and say that the plaintiff's conduct was dishonest and disgraceful. We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully. All we have to examine is, whether the defendant stated no more than what he believed or might reasonably believe, (a); if he did no more than this, he is not liable." This case was relied on by the defendant's counsel, but the circumstances of it seem to me widely different from those in the present case, for there the conduct of the plaintiff was capable of a two-fold construction. The reasoning in the judgments shows that this was assumed by the Court to be so. One person might think it deserving of the application of certain epithets, and another might not be of the same

(a) The words in the report, L. R. 4 Ex. 237, are not "or might reasonably believe," as quoted in *Laughton v. The Bishop of Sodor and Mann*, *ad loc. cit.*, but "and what he might reasonably believe."—REP.

opinion, and it seems to me that it was for this reason that the words "*or might reasonably believe*," were used.

In the present case the charge is specific—namely, that the plaintiff stole certain property. The finding is, that the defendant said on the occasion referred to, that the plaintiff was guilty of a felony, stating what the felony was, and I think the general statement of the law found in the case of *Jacob v. Lawrence, supra*, should be the guide to a proper conclusion.

It must here, I think, be assumed that the uttering of the words alleged was proved, that the occasion was proved and assumed to be a *quasi* privileged one, and that the real question was, whether or not in and by the defamatory expressions used by the defendant, he exceeded the requirements of the occasion; it appearing also that the defendant will not fairly pledge his oath and say that he believed at the time that the words spoken were true.

Complaint was made of the charge of the learned Judge. Some portions of the charge may not be quite accurate. One should not expect as high a degree of accuracy in words, in a necessarily verbal statement as where the statement is reduced to writing; and in many charges of learned Judges one finds unnecessary words. The latter part of the charge in the present case, was as follows: "But if the evidence satisfies you that the defendant did use these terms, and did tell the woman the reason we owe your husband nothing is, because he stole our boat, cooking stove and other things and sold them—if you believe that he did that, then gentlemen the plaintiff would be entitled to your verdict, unless you are satisfied that at the time the defendant made use of these expressions, he did it without malice—that is to say, that he did it as a reasonable man giving a reasonable answer to a wife when she applied to him for the payment of her husband's wages; I do not think I can put it more plainly than that. If you think that was the case, then, in my opinion, the occasion would be privileged, and your verdict should be for the defendant. If on the other hand you

think it was done without any reason at all, and was just simply as an insult to a woman on the street, and certainly a gross libel on her husband's character, if the defendant had no reasonable belief for saying it, why then the plaintiff would be entitled to your verdict. But if you think it was done in good faith, and in consequence of the application made by the woman for her husband's wages, if you are satisfied that that was the reason, and that it was done in good faith, then gentlemen I should say, that the occasion was privileged and the defendant would be entitled to your verdict."

This last sentence of the charge (which one would think the most important one) seems to me, to put the matter to be decided, fairly enough for the defendant, and by their verdict the jury seem to have found that what was said by the defendant was not said in good faith, in consequence of the application made to him by the plaintiff's wife. If it was not said in consequence of that application, perhaps the true conclusion would be that the privilege is not available to the defendant at all. If it was said in consequence of the application and in bad faith, the defendant not believing at the time the statement made by him to be true, can it be fairly said that it was not in excess of the requirements of the occasion and maliciously said?

I am of the opinion that the complaints against the charge should not be sustained. The contention that the case should have been withdrawn from the consideration of the jury, must, I think, fail; and, on the whole case, I think, there should not be another new trial.

There have already been two trials, a verdict for the plaintiff on each occasion, and the damages assessed at nearly the same sum.

The application should, I think, be dismissed, with costs.

BOYD, C., concurred.

A. H. F. L.

September 5th, 1887. On the application of the defendant, the Divisional Court gave leave to carry this case to the Court of Appeal.—*REP.*

## [CHANCERY DIVISION.]

## McCASKILL v. RODD.

*Illegal distress—No rent reserved—2 W. & M. sess. 1, ch. 5, sec. 5—  
Damages—Double value.*

In an action for illegal distress, in which the Judge who tried the case found that the plaintiff occupied the premises in question under an agreement with the defendant, by the terms of which no rent was payable by the plaintiff to the defendant, and that the distress was therefore illegal, upon which plaintiffs claimed double the value of the goods as damages, under 2 W. & M. sess. 1, ch. 5, sec. 5:

*Held*, that the 5th section of the statute, by reference to the 2nd second section, does not extend to a holding of land where there is no rent reserved, and that the plaintiff was not entitled to double value.

THIS was an action for illegal distress, brought by William McCaskill against John Rodd.

The plaintiff's statement of claim set up the taking by him of the premises (a hotel, &c.) from the defendant, and alleged that no rent was to commence to run until a certain improvement was made by the defendant, if the plaintiff kept the place open for the accommodation of the public: that he did so keep the place open, and that defendant seized his things and sold them by way of distress for rent due before he made the improvement.

The defendant's statement of defence denied the agreement for the improvement, but admitted that the plaintiff had gone into possession without any rent being fixed, as a hotel business was new there, and neither plaintiff or defendant knew what the rent of the premises would be worth, and alleged a subsequent fixing of the rent at \$300 a year, and that the distress was regularly made for the rent due.\*

The case was tried at the Whitby Assizes on March 16th and 17th, 1887, before Rose, J.

*J. A. McGillivray* for the plaintiff.

*D. J. McIntyre* for the defendant.

\* There were also some other matters in dispute which it is unnecessary to notice here.—REP.



After hearing the evidence the learned Judge held that the distress was illegal, as the plaintiff held the premises under an agreement under which no rent was payable.

Plaintiff's counsel asked for double the value of the goods as damages under 2 W. & M., sess. 1, ch. 5, sec. 5.

The learned Judge reserved judgment.

March 19, 1887. ROSE, J.—At the hearing on the 17th March, instant, at the Whitby sittings, I found that the plaintiff occupied the premises in question under an agreement with the defendant, by the terms of which no rent was payable by the plaintiff to the defendant, and that therefore the distress was illegal, and a trespass.

Thereupon Mr. McGillivray asked for double value of the goods to be assessed as damages for such trespass under 2 W. & M. sess. 1, ch. 5, sec. 5.

I reserved the question to look into the authorities.

In the case of *Mitchell v. McDuffy*, 31 C. P. 266 and 649, Galt, J., was of the opinion that the Act did not apply, while the learned Chief Justice and Osler, J., thought it did.

My learned brother Galt gave his reasons at length, while the opinions of the other members of the Court are to be found in a note at p. 649, without reasons.

In his judgment, my learned brother Galt, rested upon the language of section 5, "Provided always \* \* that in case *any such distress and sale as aforesaid*, shall be made by virtue or colour of this present Act for rent pretended to be arrear and due when in truth no rent is arrear or due to the person or persons distraining," the owner shall recover double the value of the goods; and of sec. 2, "that from and after the 1st day of June, 1690, that where any goods or chattels, shall be distrained for *any rent reserved* and due upon any demise," &c., the same may be sold.

The argument is, that "any such distress and sale as aforesaid," refers to a distress and sale such as the Act is dealing with—viz., "for any rent reserved."

It will be observed that the pretence referred to in section five, is, that the rent *is arrear* and due, "where in truth no rent is arrear or due:" and is not, that rent *is reserved*, when, in fact, no rent is reserved.

I find in Bullen & Leake, 2nd ed., p. 275, the form of count given under this section is as follows: "That the plaintiff was tenant to the defendant of a messuage at a *certain rent* payable by the plaintiff to the defendant," &c.

In *Archbold's* Landlord and Tenant, 3rd ed., at p. 341, a form of declaration is given: "For that the plaintiff \* \* was tenant \* \* at and under a certain rent, therefor payable by the plaintiff to the defendant, to wit, the rent or sum of £—, per annum," &c., and on p. 342 the learned author states, that "To support this declaration the plaintiff must prove: 1. The tenancy, and at what rent, as stated in the declaration."

In *Salter v. Brunsten*, 4 Mod. R. 231, the declaration sets out a complaint by Nicholas Salter against John Brunsten for a wrongful taking of goods and chattels "*nomine districtionis pro redditu per ipsum Nicholaum præfat Johanni Brunsten super dimissionem messuagii et quarundem terrarum eidem Nicholao per ipsum Johannem Brunsten antetunc fact. debit, et in aretro fore supposit. et pretens. colore cujusdam actus parlamenti in hujusmodi casu nuper edito. et provis ceper. et distriker. et bona et catalla illa sic district. adtunc et ibidem detinuer, &c.*"

Judgment was signed by default. On motion in arrest of that judgment it was held that it was not necessary to state a demise in form, for it was sufficient to say that the goods were taken *nomine districtionis*.

The result of the case is stated in *Stephens*, N. P., at p. 1364, as follows: "In an action on this statute it seems to be sufficient for the declaration to allege that the distress was made for rent *supposed to be due upon a certain demise*, before then made, by the defendant to the plaintiff, without specifying the particulars of the demise itself, and to state generally that it was taken for and in the name of a distress, without adding for rent arrear."

It may be noted that the case of *Salter v. Bruntsden* was decided in Mich. Term, 5 W. & M., and that the section of the statute is quoted, with the word "such" left out, as follows: "That in case any distress," instead of "any such distress" as is found in the Act. And the same wording is found in *Stephens*, N. P., at p. 1364.

In the form of declaration, as will be observed, is the averment of the taking in the name of a distress for rent upon a demise.

In *Yates v. Tearle*, 13 L. J. N. S., p. 289 (1844), the first count was in case, setting out a holding as tenant under a certain yearly rent, &c. Plea: That the plaintiffs did not hold the second messuage, &c., in the declaration mentioned as tenant thereof to the defendants *modo et formâ*. Demurrer, assigning for cause that the traverse was immaterial. Judgment was given for the defendants.

Patteson, J., during the argument, said: "The whole argument on the other side must be that it is not necessary to shew any tenancy; for if it be, necessary to aver it, the averment must be traversable."

The judgment of the Court was delivered by Lord Denman, C. J., who said: "The defendants, therefore, have the right to traverse that the rent was due to Thomas Tearle and Ebenezer Tearle, that is, in somewhat indirect words, to traverse that those persons were the landlords of the premises. \* \* If the defendants were not the landlords, or servants of the landlords of the premises, *they must be mere strangers and trespassers*; and the action should be trespass, and not case, under the statutes 2 W. & M., ch. 5, sec. 5, and 11 Geo. 3, ch. 19, sec. 19. Who was the landlord, was therefore, a material question; *that is the substance of the issue.*"

It was apparently thought necessary, immediately upon the passing of the Act to set up a demise at a fixed rent, and the forms of pleading so far as I can discover have ever since been in accordance with such view.

I would have been glad to have had the reasons for the opinion of the learned Chief Justice and my learned

brother Osler, for the conclusion at which they arrived in *Mitchell v. McDuffy, supra*. It may have been formed on the special facts of the case.

I am of the opinion that the 5th section, by reference to the 2nd section, does not extend to a holding of land where there is no rent reserved, and hence, in this case, the plaintiff is entitled to the value of the goods sold with costs, but not to double value.

For these reasons, and others upon the facts stated at the hearing, there will be judgment for the plaintiff for \$326.35 on the claim, with full costs, and for the defendant on the counter-claim for \$279.10, with full costs. The plaintiff to be at liberty to issue execution for the balance coming to him,

G. A. B.

---



## [CHANCERY DIVISION.]

## NORMAN ET AL. V. HOPE.

*Replevin—Action against sheriff for taking insufficient bond—Damages recoverable therein—R. S. O. ch. 53, sec. 11.*

The judgment of Armour, J., reported 13 O. R. 556, affirmed with costs.

THIS was a motion, by way of appeal, to the Divisional Court from the judgment of Armour, J., reported 13 O. R. 556, the defendant moving to set aside the judgment and enter a verdict for him, or to reduce the damages to the amount of rent lost.

The matter came up on June 24th, 1887, before Boyd, C., and Ferguson and Robertson, JJ.

*Lash*, Q. C., for the defendant.

*Langton*, for the plaintiff.

THE COURT having referred to sec. 8, subsec. 18 of the Interpretation Act, R. S. O. ch. 1, which provides that "the word 'sureties' shall mean 'sufficient sureties,'" counsel for the defendant abandoned the point as to the liability of the sheriff, but argued that the damages awarded were excessive, and that at any rate, as the sureties were known to be worthless, the costs of the action against them should not have been allowed against the sheriff.

*Langton*, for the plaintiffs, was not called on.

THE COURT dismissed the motion, with costs, refusing to interfere.

A. H. F. L.

---

## [CHANCERY DIVISION.]

## WARNOCK &amp; CO. v. KLEOPFER &amp; WALKER.

*Fraudulent preference*—"Insolvent," meaning of—R. S. O. ch. 118—48 Vic. ch. 26, sec. 2 (O).

A man may be deemed insolvent within the meaning of R. S. O. ch. 118, as amended by 48 Vic. ch. 26, sec. 2, if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

*Rae v. McDonald*, 13 O. R. 352, discussed.

*Held*, [affirming the decision of O'Connor, J.], that under the circumstances of this case, a certain assignment of book debts made by J. M. to the defendants was made by him when in insolvent circumstances, and was void as against the plaintiffs under the above enactments.

THIS action was brought by Warnock & Co., merchants, against Kleopfer & Walker, who were also merchants, who in their statement of claim set up that prior to October 23rd, 1885, one James McNeil was indebted to them in a sum of \$403.53: that on March 22nd, 1886, they recovered judgment against him for that amount and \$19.81 costs, and issued writs of *fiери facias* against his goods, but the same were still in the sheriff's hands unexecuted, and the judgment was unsatisfied, and J. McNeil had no goods or lands liable to seizure: that on October 3rd, 1885, being in insolvent circumstances and unable to pay his debts in full, with intent to defeat, delay or prejudice his creditors and the plaintiffs in particular, he assigned to the defendants all his book debts and accounts: that he did this with intent to give, and the defendants accepted the same as creditors with intent to obtain a preference over the plaintiffs and other creditors, if any, of J. McNeil: that at any rate the said assignment was made by McNeil, when unable to pay his debts in full, and had had the effect of delaying defeating and prejudicing the plaintiffs in the recovery of the amount of the said judgment, and of giving the defendants a preference contrary to the provisions of 48 Vic. ch. 26, sec. 2 (O.), and the plaintiffs claimed that the said

assignment should be declared utterly void: that the defendants should be ordered to account for the moneys collected thereunder and the same declared available to satisfy the plaintiffs' judgment and execution, and for further relief.

Amongst other things in their statement of defence the defendants alleged that at the date of the assignment in question McNeil was perfectly solvent and able to pay his debts in full: that he was at that time indebted to the defendants on certain promissory notes in the sum of \$747 or thereabouts, but had given up business, and in order to allow him to collect his book debts it was agreed by the said assignment that the said book debts should be placed in the hands of Jermyn & Jermyn, financial agents, who should collect the same, and after paying the said notes and renewals should pay the balance to J. McNeil: that the books were accordingly placed in the hands of Jermyn & Jermyn, but after collecting some of the said book debts one of that firm died, and shortly after the other absconded, whereupon the plaintiffs illegally seized the books, and although they have since abandoned the same they had delayed and harassed the defendants and prevented them collecting the accounts or ascertaining properly the value of the said book debts or what sums might be collected therefrom, and the defendants were unable to say what amount of the debts might yet be collected, but they were ready and willing to account for all sums they might collect of the same over and above what was sufficient to pay the indebtedness of McNeil to them.

The action was tried at Owen Sound on April 1st, 1887, before O'Connor, J., who endorsed his judgment on the certified copy of the pleadings as follows:

"After careful examination and consideration of the evidence taken and of the authorities cited by counsel on both sides, I have concluded that the assignment from McNeil to the defendants in the within pleadings mentioned comes within the meaning of sec. 2 of the Ontario Act, 48 Vic. ch. 26, "An Act respecting Assignments for

the benefit of creditors," and is as against the creditors of the said McNeil "utterly void:" that the plaintiffs were at the time of the making of the said assignment creditors, and had become judgment creditors before this action brought, of the said McNeil; and that there were then, (that is, at the time of the assignment), other creditors of McNeil: that Jermyn & Jermyn in the assignment and evidence mentioned were the agents of the defendants appointed to collect the debts assigned; and I order that judgment be entered for the plaintiffs declaring the said assignment void, and setting it aside: and that the defendants account for the moneys collected by them or their agent or agents under the said assignment, and for that purpose that the proper accounts be taken on reference to the Local Master at Owen Sound; and as I do not consider the case new or difficult, and also as the defendants refused to account to the plaintiffs when requested, and denied the plaintiffs' right to an account, I order the defendants to pay the plaintiffs the costs of this action and of the reference."

The defendants moved by way of appeal to the Divisional Court, and the matter came up for argument on June 25th, 1887, before Boyd, C., and Ferguson and Robertson, JJ.

*McCarthy*, Q.C., and *G. W. Field* for the defendants, referred to *Rae v. McDonald*, 13 O. R. 352, 367.

*Masson*, Q.C., for the plaintiffs referred to *River Stave Co. v. Sill*, 12 O. R. 557, 567.

June 29th, 1887. BOYD, C.—The question as to the meaning of "insolvency" in the Act, 22 Vic. ch. 96, sec. 9, which is now R. S. O. ch. 118, as amended by 48 Vic. ch. 26, sec. 2, has received an exposition in early cases which has always governed the application of the enactment in my experience, so that the point is not really open for determination unless by an appellate Court. *Rae v. McDonald*, 13 O. R. 352, was cited as the latest case, in which the



views of Rose, J., resting mainly on American cases, are in accord with those of the earlier Canadian cases, while the opinion of Cameron, C. J., is rather at variance with the authorities by which we are bound. He thinks that in determining whether a debtor is insolvent or not "his assets are not to be estimated at what they might bring at a forced sale under execution but at their fixed value in cash on the market at an ordinary sale"—p. 366. But as against this compare the decision of Spragge, V.C., in *Davidson v. Douglas*, 15 Gr. 347, where he says at p. 351: "In considering the question of the solvency or insolvency of a debtor, I do not think that we can properly look upon his position from a more favourable point of view than this, to see and examine whether all his property, real and personal, be sufficient, if presently realized, for the payment of his debts'; and in this view we must estimate his land as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or at a sale when the seller cannot await his opportunities, but must sell." And further on, at p. 353, the Vice-Chancellor proceeds: "There is no doubt as to the meaning of the words 'in insolvent circumstances'—that it is not necessary that the debtor should be either technically a declared insolvent or openly and notoriously insolvent. The statute has been acted upon in many cases where the debtor was neither the one nor the other, the words of the Act having been interpreted as they should be according to their plain, ordinary, grammatical meaning." In very much the same way do the Barons of the Exchequer deal with identical words in *Teale v. Younge*, McL. & Y. 496. Alexander, L.C.B., says: "By 'insolvent circumstances' the Legislature cannot have meant a state of complete insolvency." And Graham, B., as to these words, says: "One must understand that in the popular sense of the words—that the man was not in a condition to pay readily when called upon; in other words, that he was in tottering circumstances;" and Garrow, B., says: "I admit that a man is not insolvent

because he postpones the payment of a demand for a week or ten days, during which the creditor consents to wait, or renews a bill; and yet these are indications of a want of present power to fulfil his engagements. These, however, are cases to be decided by a jury upon the whole matter"—p. 506. Other cases are referred to in *Whitney v. Toby*, 6 O. R. 54.

A man may be deemed insolvent in the sense of the Act if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

The present case is within the meaning and the mischief of the amended statute. The debtor was by his own admission in the evidence unable to pay his debts as they fell due. He admitted that his only available assets were his book debts and his house and lot. He had sold out his business for a trifle, and was going into an itinerant agency for selling horse shoes. His land was worth at the highest, I should say, \$700, and it was mortgaged for \$225. This would give a close margin of \$475. His book debts in face value were \$1,800, and he says he calculated there would be \$1,500 good. But it is to be noted that he turned over the whole of these debts to answer the claim of the defendants, to whom he was indebted in the sum of \$747. The agents, Jermyn, were to collect on 10 per cent. commission till the said debt was fully paid. That asset was therefore practically locked up from the other creditors, who had nothing to look to but the land. The other creditors, however, aggregate debts to the extent of \$818 (plaintiff \$403, Harvey \$215, and small debts \$200). The defendants knew of the other creditors when the assignment was made, and knew that nothing was left for their satisfaction but the land, and that could not be sold for a year under execution. If the plaintiffs and defendants in dealing really considered their book debts worth \$1,500, only one-half of them should have been assigned for the benefit of the defendants. The transaction imports that the book debts.

were worth much less than \$1,500, as indeed might naturally be expected. \$1,000 or \$1,200, or even less, would be a much more likely figure, and 10 per cent. was to come off for collections. But if put up on a forced sale, neither property would be likely to have realized the values on which I have been gauging results. The manner of carrying out the transaction between the debtor and the defendants was prejudicial to the other creditors, the chattels and book debts being all turned over for the benefit of the defendants, while only the equity of redemption was left which could not be realized on for a year. The effect of this was to delay as well as to leave insufficient property for the satisfaction of the unsecured creditors. I think the judgment well founded so far as it declared the assignment invalid—but the relief should be confined to the moneys thereunder, which have been or but for the wilful default of the defendants might have been received by them. They are not answerable for the whole amount transferred, for they had not the right to collect the accounts or to take the collections out of the hands of the agents without the assent of the assignor. If those agents have defrauded the defendants and the assignor by collecting and making away with any of the proceeds of the book debts, that in the absence of wilful default should not be imputed to the defendants so as to make them account for more than has been received. With this modification the judgment should be affirmed, but the costs should be reserved till accounts are taken. If no more than \$100 is chargeable against the defendants (as they admit this) then I think there should be no costs of this appeal ; but if more substantially is found due, then the plaintiffs should get their costs of this application.

FERGUSON and ROBERTSON, JJ., concurred.

A. H. F. L.

---

## [CHANCERY DIVISION.]

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF WEST  
NISSOURI v. THE MUNICIPAL CORPORATION OF THE  
TOWNSHIP OF NORTH DORCHESTER.

*Municipal corporations—Drainage works extending through adjoining townships—46 Vic. ch. 18 ss. 570, 598 (O.)*

The township of N., on the petition of seven out of ten property owners, passed a by-law under 46 Vic. ch. 18, sec. 570 (O.), for construction of a drain which was to extend through the adjoining township of D., forming one entire scheme of drainage through both townships. The property owners directly affected by the work were thirty-nine in D. and ten in N., and the rateable division of the costs of the work was \$1,345 to be paid by N., and \$5,725 by D.

This action was brought by N. to compel D. to pass a by-law under 46 Vic. ch. 18, sec. 581, to raise its proportion of the fund, which it refused to do.

*Held*, [affirming the judgment of GALT, J.], that the case was not one contemplated by sec. 570 and following sections, but fell within sec. 598, and that the county council was the proper authority to pass a by-law for the construction of such a drain as that proposed.

*Seem*, that, even under sec. 570, in cases where the drainage work extends beyond the limits of one township, a petition by the majority in number of the persons to be benefited in any part of the townships is required, the parts of both townships being considered for the purpose of the Act as forming a quasi-municipality for the proper drainage of the particular locality, so that a majority of all that section formed by the combined parts of the two municipalities may ask for, and if the council of the originating township thinks proper, obtain the needful relief.

*Corporation of Dover v. Corporation of Chatham*, 12 S. C. R. 321, commented on.

THIS was an action for a mandamus to compel the passage of a by-law by the above defendants for the purpose of raising certain moneys to be expended on drainage works, under the Consolidated Municipal Act 1883, secs. 570, 580-2. The statement of claim set out the facts as follows: that the above named plaintiffs and defendants were adjoining municipal corporations: that certain low lands in each of them along the boundary line extending northerly into West Nissouri, and southerly into North Dorchester, would be benefited by constructing a drain through them: that the majority in numbers of the owners of the said low lands in West Nissouri as shown by the last revised assessment roll, to be benefited by the



drainage, signed and presented a petition under the Consolidated Municipal Act of 1883, to their municipal council, praying that the latter would cause a drain to be constructed under the said Act so as to drain their said lands, as a local improvement, by special assessment under the provisions thereof: that the plaintiffs' council caused a proper examination of the locality to be made, and proper plans and estimates to be made by a Provincial Land Surveyor, and an assessment of the real property to be benefited by the drainage, stating the proportion of benefit to be derived therefrom, which were adopted by the council, and a by-law embodying the same provisionally passed on June 10th, 1886: that thereby the plaintiffs were required to provide and raise \$1,345, and the defendants \$5,725 for the construction of the drain, and the improvements and expenses incidental thereto: that all necessary steps were taken, and the said by-law was finally passed on July 16th, 1886, and the defendants duly notified: that though more than four months had elapsed since the head of the defendants was served with a copy of the said report, plans, specifications, assessments, and estimates, yet the defendants had not passed any by-law to raise such sum required from them; nor had they taken any proceedings to quash or set aside the said by-law; and the plaintiffs claimed a mandamus to compel the defendants to pass such a by-law as is contemplated by the said Consolidated Municipal Act, or that the defendants might be ordered to provide and pay over to the plaintiffs the money required to be provided by them for the construction of the said drain as ascertained by the engineer's report and provided in the by-law passed by the plaintiffs as aforesaid.

By their statement of defence, the defendants said that the alleged by-law was invalid, and that they were not bound to pass a by-law to provide the moneys required for the purpose of completing the proposed ditch or drain within the limits of their own municipality: that the alleged by-law was invalid amongst other reasons, because

it was not founded on such a petition as is required by the provisions of the Consolidated Municipal Act of 1883, and amendments thereto, and the petition therefor was not signed by the requisite proportion of the landowners interested, and shewed on its face that others than those owning lands in West Nissouri were interested in the said ditch or drain, and none of them were parties to the said petition.

The action came on for trial at London, on May 11th, 1887, before Galt, J., without a jury, who reserved judgment, and afterwards on May 26th endorsed the same upon the certified copy of the pleadings as follows:

"I find that the work in question proposed to be constructed, affects both the municipalities of Nissouri and North Dorchester, and that under the 598th section of the Municipal Act, 46 Vic., the county council is the proper authority to pass by-laws for such a purpose, and that the plaintiffs had no power to pass the by-law now before me. I therefore dismiss this action with, costs."

The plaintiffs moved by way of appeal to the Divisional Court, and the matter came up for argument on June 20th, 1887, before Boyd, C., and Ferguson, J.

*W. W. Fitzgerald*, for the plaintiffs. The power given to the county council is cumulative under 46 Vic. ch. 18, (O.) sec. 598. The other secs. 570, *et seq.*, shew the powers of the townships. Section 570 and secs. 576, 579, 580, 581, would be absolutely meaningless if the townships have no power to act. Section 598, does not say the others are void; they give compulsory power. *Corporation of Chatham v. Corporation of Sombra*, 44 U. C. R. 305, shews that an action may be brought by the initiating municipality for payment over of the money by the adjoining municipality before the work has been begun. See also *In re Montgomery and the Township of Raleigh*, 21 C. P. 381; *Corporation of the Township of Chatham v. Corporation of the Township of Dover*, 12 S. C. R. 321.

*W. R. Meredith*, Q. C., for the defendants. What is proposed to be done is one entire scheme of drainage affecting the two townships, and there must be a majority petitioning of those to be ultimately benefited in both townships. 46 Vic. ch. 18, sec. 284 (O.), shews that each township is entitled to its own territory. If one property owner in Nissouri presented a petition and the council passed a by-law they might, according to the plaintiffs' contention, impose \$50,000 of taxes on the adjoining township. The fundamental principle is local option. By sec. 27 of 49 Vic. ch. 37, (O.) sec. 576 of 46 Vic. ch. 18, (O.) is amended, and as amended, simply gives power to a municipality to continue the works into an adjoining one if that municipality desires it. *Re White and the Corporation of the Township of Sandwich East*, 1 O. R. 530. The other point is as to the description of the property proposed to be drained. My objection is, that no locality is described, but simply a description of the course of the drain, not of the property to be drained; *Re Corporation of the Township of Romney and Corporation of the Township of Mersea*, 11 A. R. 712. The basis of the proceeding is a petition by a particular number of persons, and here on the face of the by-law it is shewn that the petition is not sufficient as not describing the locality, although the petition is in itself sufficient as to Nissouri at all events. All that Dorchester desires is, that it shall be within the law.

June 29th, 1887. *Boyd, C.*—This case involves the meaning of the clauses of the Municipal Acts relating to drainage when the work originates in one township and is carried into an adjoining municipality. These sections have been characterized in a late case by the Court of Appeal as "difficult and obscure," and the elucidation of them has not been aided by the diametrically opposite opinions of the Judges of the Supreme Court in the same case: *Corporation of Dover v. Corporation of Chatham*, 11 A. R. 248, and 12 S. C. R. 321. It is not

in dispute that the persons directly affected by the drainage as owners of property through which the drain is contemplated, are as follows: thirty-nine in Dorchester, the lower or non-originating municipality, and ten in the township of Nissouri, the township which has initiated the proceedings. The petition presented under 46 Vic. ch. 18, sec. 570, is signed by only seven residents of Nissouri. This being a majority of the property owners in Nissouri, a by-law has been passed by that municipality for the doing of the work, which includes one entire scheme of drainage through both townships, and this action is taken to compel Dorchester to pass a by-law under sec. 581, to raise its proportion of the funds. As proposed to be divided between the parties, the cost falling to the plaintiffs is \$1,345, and the cost to the defendants is \$5,725.

I am inclined to agree with the result of the judgment of Galt, J., that this is not a case contemplated by sec. 570 and following sections, but falling within sec. 598, because it is an entire work, the greater part of which is to be done in and paid for by Dorchester. The intent of the statute, it appears to me, is, that if the drain projected in one township is carried into a neighbouring township, it should only be for the purposes of outlet, where that outlet can be found within a reasonable distance of the boundary. It cannot be that a few residents at the side of one municipality can initiate drainage proceedings from their land across the whole or greater part of an adjoining township against the will of the large majority of those interested. The self-governing powers of municipal bodies would be thus destroyed, and besides a minority in one township, would be able to coerce a majority in another township. But if such a case is within sec. 570, then I agree in the principle of construction applied to the municipal law which is enunciated in the judgment of Henry, J., in 12 S. C. R. 333, though as at present advised, I am not disposed to go so far as that learned Judge. He says, p. 334: "It seems to me where the



property is situated in two townships, it would be necessary to shew that the petition was signed by a majority of the persons to be benefited in both."

This construction appears to overlook the provisions of sec. 581, which directs the council of the servient municipality to pass the by-law, "as if a majority of the owners of the lands to be taxed had petitioned as provided in sec. 570." If an actual majority of such owners had in fact joined in the original application under sec. 570, that would seem to be a superfluous provision. I would suggest to harmonize these sections and to give effect to the broad principle underlying municipal local government, of each municipality regulating its own internal and territorial concerns, that the Interpretation Act should be invoked, by which the singular number may include the plural, and apply that to sec. 570. That would then be read in cases where the drainage work extends beyond the limits of one township to provide for a petition by the majority in number of the persons to be benefited in any parts of the two townships. For the purpose of the Act the parts of both townships would be considered as forming a *quasi* municipality for the proper drainage of the particular locality, and then a majority of all that section formed by the combined parts of the two municipalities, would be able to ask for and if the council of the originating township thought proper to obtain the needful relief. This is perhaps a clumsy expedient to endeavour to carry out the provisions of the Act according to the spirit of municipal government, but it appears to me to give a better result than to ignore entirely the language of sec. 581. There might be less than a majority of the owners in the servient township joining in the petition, but if there was a large enough majority in the dominant township to make, when the owners in both parts were added together, a majority *quoad* that aggregate, then the work would be justified by the statute as if a majority of the owners of the land in the servient township had petitioned.

The result is, however, which ever view be taken, that the present judgment should be affirmed with costs.

FERGUSON, J., concurred.

A. H. F. L.

---

[CHANCERY DIVISION.]

COX V. HAMILTON SEWER PIPE COMPANY.

*Master and servant—The Workmen's Compensation for Injuries Act, 1886—  
Negligence of person in charge of machine—Notice of action—49 Vict.  
ch. 28, secs. 3, 7, 10, (O.)*

Solicitors for the plaintiff before action wrote as follows to the defendants:—

“We have been consulted by Mr. J. Cox concerning injuries sustained by him while in your employ by which he lost his left hand. We have received instructions to commence an action against you for damages, unless the matter is satisfactorily settled without delay. If you intend contesting this suit, kindly let us have the address of your solicitors who will accept service of process on your behalf.”

*Held*, reversing the decision of CAMERON, C. J., C. P. D., that this was sufficient notice of action to satisfy the requirements of 49 Vict. ch. 28, sec. 7, and sec. 10, (O.)

*Stone v. Hyde*, 9 Q. B. D., 76 followed.

*Held*, also, that the evidence in this case, in which the plaintiff, while at work in the sweat-box of a sewer pipe company and engaged in placing the clay in the press, was, according to his witnesses, injured by reason of S. who was in charge of the press, causing the plunger to come down before the plaintiff had given the word, and while his hand was in the press, *prima facie* brought it within sec. 3, sub-sec. 3 of the said Act, and the nonsuit must be set aside and a new trial had.

*Per* BOYD, C.—If, while in obedience to orders, injury arises through the negligence of one giving the orders, it is sufficient under this sub-sec., and it is not necessary that an order negligent *per se* should have been given, nor is any specific order necessary, general prior orders being sufficient.

THIS was an action under the Workmen's Compensation Act, 1886, 49 Vic. ch 28, (O.)

The defendants used in the manufacture of sewer pipes a machine worked by steam, in connection with which the plaintiff was employed in filling a cylinder with clay. Another employee named Somers had charge of the steam

which brought into action a plunger. When the plaintiff, standing on an elevated platform, called the "sweat-box," had filled the cylinder and adjusted it, he was in the habit of calling out, "all right, go ahead," when Somers standing below would put on the steam and bring down the plunger. The cause of the action was, that on one occasion Somers brought down the plunger before the plaintiff called out, and while he was adjusting the clay, and so cut off the plaintiff's left hand.

The portions of the statute relied upon by the plaintiff to establish the liability of the defendants for the negligence of Somers, were :

Sec. 3.—"Where, after the commencement of this Act, personal injury is caused to a workman.

(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer ; or,

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence ; or,

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury, was bound to conform and did conform, where such injury resulted from his having so conformed ; \* \*

The workman \* \* shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.

The action was brought on for trial at the Hamilton Spring Assizes, 1887, before Cameron, C. J., and a jury.

The plaintiff's evidence was that he went to work on the sweat-box in the latter part of June, 1886, and the accident was on the 17th of August following. He was put to that work by Mr. Brown, the foreman of works, and had received instructions from Mr. Waddell, who was admitted to be the sole proprietor of the Hamilton Sewer

Piper Company, about placing the clay in the press. Mr. Waddell said it was to be put in level, and he put his hands into the press and shewed the plaintiff how to arrange it. In filling the clay into the press the chunks were liable to catch against the shafts, and the plaintiff had to put his hand in and loosen them; he had no implement for that purpose. If the clay was not level in the press the pipe would come out crooked. At the time of the accident Somers was in charge of the press; he would push on the lever and put on the steam by raising or lowering the lever; when it was all ready, the plaintiff would call out "all right, go ahead." Somers could not see the plaintiff from where he stood. On the occasion of the accident the plaintiff had given no signal; he had his hand in the press, loosening a chunk of clay, and had not got the press filled ready for the plunger to come down; no notice of the plunger going to be brought down was given; the plaintiff lost his hand by the plunger being brought down; Somers put on the steam which brought it down. Somers was the man in charge of the press: "if we did not do what he told us, he would go and tell Mr. Brown and Mr. Waddell; they told him, if we did not do what he told us, to go and report to them." The plaintiff took his instructions from Somers. Nothing was provided for arranging the clay to avoid putting the hand in. Plaintiff did as he was told. His wages at the time of the accident were \$1.25 a day.

On cross-examination the plaintiff said that Somers was working under Brown and taking his orders; Brown was superintendent of the whole works; Somers worked on the machine every day when it was running; when the machine was not running, Somers was filling or emptying kilns, and other things, stacking pipe, and so on; doing any work that was going on under the direction of Brown; the machine was running about two days in the week; when it was not running, Somers was engaged as a hand round the factory, taking orders from Brown, just like the plaintiff himself.



“Q. Then, Somers could not give you any direction where he stood, as to how to fill the clay; you had to use your own judgment? A. He told me.

Q. While you were filling the clay into the receiver, Somers was out of sight? A. Yes, sir.

Q. So that he could not give you any orders while you were filling it how to do it. A. He gave me orders; \* \* he would tell me to fill it up level. These were my general instructions to fill it up level.

Q. What further instructions did he give you? A. To take the water off the plunger.

\* \* \* \* \*

Q. So he did not have any occasion to tell you how to fill the clay? A. Not where he stood.

Q. All you had to do was to obey the instructions to fill it up level? A. Yes, sir.

Q. And that is about all the instructions you had? A. Yes.

Q. Then, when the plunger was up, you only had to give the word of command? A. Yes, sir.

Q. And Somers obeyed your call? A. Yes, sir.

Q. So that you were aware you had the control, or ought to control the motion of the machine? A. Yes, sir.

Q. And Somers was aware you had the control of the motion of the machine? A. Yes, sir.

Michael Cary called for the plaintiff, said that he was employed at the defendants' works and was present at the time of the accident. Somers was the person in charge of the press, who directed its running; Somers gave directions to those working it; it took three men to run the press; Somers, the man who turned on the steam, was the recognized head; the witness was engaged on the same press, pulling the lever to free the socket: "I have seen Somers come up there and put his hand in the feed box, and shew the man how to put this clay around; if it was not in level all round the plunger, the pipe would not come out straight. Somers put his hand in the box and shewed the men how to do it. \* \* I saw him running

up there giving directions to several people ; I saw him going up to Cox and giving him directions.

Q. Did you hear and see him give directions to others besides Cox ? A. Yes ; I cannot say to whom exactly, but to several people. \* \* I took all my instructions from Somers. \* \*

Q. Have you told us all the directions Somers would give ? What other directions would be necessary to the working of the press ? A. All the directions that the man should holler "all right," before this plunger came down.

Q. Those instructions were given by whom ? A. When I first went there, I heard them given all right.

Q. Who was the man who would report to the defendants any neglect or non-observance of duty on the part of the men working the press ? A. Somers.

Q. Do you know of any occasion of his reporting men who had not performed their duty there ? A. I do not.

On cross-examination : "Q. Sometimes Somers would be on a job, sometimes you would be on a job, and sometimes Cox would be on a job, according to Brown's directions ? A. Yes, there was no particular work there, except the time they were running the press.

Q. Somers attended to the steam lever and you attended to the other lever ? A. Yes.

Q. And the machine was operated. Who called out to you when you operated your lever ? Or did you use your own judgment ? A. Mr. Somers used to say, all right, to pull my lever ; when he would pull, I would pull too.

Q. Cox would give the order when he was ready ? A. Yes."

James Talbot, called for the plaintiff, swore that he was employed in the defendants' works at the time of accident ; he was at every kind of work ; he worked on the sweat box ; used to change with Mulholland and whoever was up there ; the heat was excessive, and one man changed with another. Mr. Somers had most of

the running of the thing there ; we had to do as Somers told us ; there was one in the sweat box, one at the lever, and one to take the pipe out ; the lever, where the steam was turned on, was worked by Somers ; Somers would tell us to fill it up level, and he has often run up the steps to shew us how to do it ; if there was a hollow there, we had to fill that up.

Q. He would come up occasionally and see how it was filled ? A. Yes, sir.

Q. And would direct you how to do ? A. Yes, sir.

Q. How would he do it ? A. He would pull a chunk aside with his hand ; and if there was a hollow there he would shove the clay in with his hand.

Q. From whom did the man who operated the lever to free the socket and take out the pipe, take his instructions ? A. That man had to take his directions from the man in charge of the steam lever when to pull, and all the like of that.

Q. Then, the man who would direct him, would be Somers ? A. Yes, sir.

Q. What other directions have you heard Somers give ? A. He gave directions to take the water out of the top of the cylinder ; to take the water out, and not allow it to run over and down into the clay, and cause the pipe to come out muddy.

Q. Did you hear Mr. Waddell say anything about what the men were to do under Mr. Somers ? A. They were to do as they were told.

Q. You have heard Mr. Waddell say that ? A. Yes, sir."

On cross-examination : "Q. You all worked under the direction of Brown ? A. Well, we all worked, unless we were working at that particular machine.

Q. And then Somers was the head of the gang ? A. Well, we had to do what he told us. \* \*

Q. Who would order the machine to be started, Mr. Brown ? A. When the machine was ordered to be started Somers would call the gang together and go there."

William Mawhinney, called for the plaintiff, swore that he was employed at the defendants' works at the time of the accident ; was working five or six yards from the press when it happened ; Somers was working the press that day.

Q. Who directs the running, who superintends the press ?

A. When I ran the press I generally bossed the men, and told them what to do ; I ran it before Somers, and I have run it since he left.

Q. What authority has the man that runs that press ?

A. To see that the men do the work, and do it right. \* \*

Q. Are the men there called upon to obey the instructions of the man who turns on the steam ? A. Yes ; I have got to see that the other men do their work right.

Q. Did you hear instructions given to him (Somers) ?

A. I did.

Q. What instructions were given to him by Waddell and Brown ? A. The same as I got, to see the men did the work right, and to see the pipes properly made. \* \*

Q. You have worked in other sewer pipe factories ? A. Yes, sir ; in the United States and Scotland. \* \* \*

Q. Is there anything provided there in places where you have been feeding the press ? A. Yes, sir. \* \*  
In some places a shovel shaped for the purpose, and in other places there are belts. \* \*

Q. There is nothing provided down here, I believe ? A. No, sir.

Q. Do you know whether anything has been provided since ? A. Two or three weeks after, a stick was brought there to push the clay in the press if it got stuck."

Cross-examined : "Q. You did not find occasion to ask for a shovel ? A. I spoke about it being dangerous ; there were lots of sticks around that could have been made use of."

Re-examined : "Q. Who did you speak of its being dangerous to ? A. To Mr. Brown, the foreman. \* \*

Q. What were the wages paid to the man who operated the lever turning on the steam ? A. \$1.60 a day.



Q. What did the man get who worked the lever that cut off the sewer pipe and made the socket? A. \$1.25 a day. \* \*

Q. Why were the wages different? A. Because it was a particular job about the press, and to look after the gang.

Cross-examined: "Q. You made \$1.60 a day whatever you were working at? A. Well, I did.

Q. You and Somers were two experienced men in the sewer pipe business? A. Yes."

Re-examined: "Q. Had you the power to dismiss a man who did not do his duty? A. I have dismissed them, and told them to go to the office for their money.

Q. Have men been discharged while you were there, under your direction? A. Yes, sir."

The question of notice of action also arose at the trial under secs. 7 and 10 of 49 Vic. ch. 28, (O.)

Sec. 7—"An action for the recovery under this Act of compensation for an injury shall not be maintained unless notice that injury has been sustained, is given within twelve weeks from the occurrence of the accident causing the injury." \* \*

Sec. 10—(1) "Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury, and the date at which it was sustained, and shall be served on the employer." \* \*

(5) "A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice, shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

(6) "A notice under this action shall be deemed sufficient if in the form or to the effect following:

To A. B., of (*here insert employer's address.*)

Or to the company (*or as the case may be.*)

Take notice that on            day of            , 188    , C. D. of  
(*insert address of injured person*) a workman in your employment sustained personal injury, \* \* and that such injury was caused by," &c.

Date.

"Yours," &c.

The plaintiff relied upon the following letter written by his solicitors, as a sufficient notice under these sections :

"HAMILTON, Ont., Oct. 16th, 1886.

"*Hamilton Sewer Pipe Co., City.*

"Dear Sir—We have been consulted by Mr. James Cox concerning injuries sustained by him while in your employ by which he lost his left hand.

"We have received instructions to commence an action against you for damages, unless the matter is satisfactorily settled without delay.

"If you intend contesting the suit, kindly let us have the address of your solicitors, who will accept service of process on your behalf.

"Yours truly,

"CARSCALLEN & CAHILL."

At the conclusion of the plaintiff's evidence the defendants moved for a nonsuit, which was entered by Cameron, C. J., who made the following endorsement on the pleadings: "I think the evidence is not such as can be properly submitted to the jury of any defect in the conditions of the ways, works, machinery, or plant connected with or used in the business of the defendants, and that Somers in the statement of claim mentioned, who was the cause of the injury to the plaintiff, was not a person in the service of the defendants, having superintendence entrusted to him within the meaning of sub-section 2 of section 3 of the Act 49 Vic. ch. 28, or a case under any of the provisions of the Act.

I am also of opinion the notice in the case was not a notice given under or in accordance with the statute, but I do not think the defendants were prejudiced by the defect in form, or that it was given for the purpose of misleading others. I hold it to be insufficient as not con-

taining the information required to be given by section 10 of the Act."

The plaintiff thereupon served notice of motion by way of appeal to the Chancery Divisional Court to set aside the judgment of nonsuit, and to enter judgment for the plaintiff or for a new trial.

The motion came on for argument on June 17th and 18th, 1887, before Boyd, C., and Ferguson, J.

*Lash*, Q. C., for the motion (a). The notice of action was sufficient; *Stone v. Hyde*, 9 Q. B. D. 76; *Carter v. Drysdale*, 12 Q. B. D. 91; *Thompson v. Robertson*, 12 Court of Sessions Cases, 4th series, 121. Under sec. 3, sub-sec. 3 of the Act in question, 49 Vic. ch. 28 (O.) this action was properly brought. Somers was the "boss of the gang," he got \$1.60 a day, while the plaintiff got only \$1.25; he was a person to whose orders the plaintiff was bound to conform. This was a question of fact which should have been submitted to the jury. On this point the following authorities are applicable: *Gibbs v. Great Western R. W. Co.*, 12 Q. B. D. 208; *Cox v. Great Western R. W. Co.*, 9 Q. B. D. 106; *Millward v. Midland R. W. Co.*, 14 Q. B. D. 68; *Dolan v. Anderson*, 12 Court of Sessions Cases, 4th series 804. See also the English Act and notes of cases under it in *Smith's Master and Servant*, 4th ed., p. 763.

By reason of no instrument being furnished to the plaintiff to use instead of his hands, there may be said to have been such a lack of appliances, as to constitute a defect in the ways, works, machinery, or plant, within the meaning of sec. 3, sub-sec. 1 of the Act.

*Osler*, Q. C., contra. The so-called notice of action was merely an attorney's collection letter, and in no sense a notice under the Act. If the intention of the document was notice, the Act would be complied with, but the letter on its face shews that it was not written with secs. 7 and 10 of the Act in view; it was a threat of an ordinary action of negligence, not of an action under the provisions

(a) At the trial Mr. Carscallen was counsel for the plaintiff, and B. B. Osler, Q. C., and R. R. Waddell, for the defendants.—REF.

of this Act. It was evidently the letter which would afterwards appear in the bill of cost as the second item, "letter to defendants, 50 cts.," whereas for a regular notice of action there could be no charge made in the suit. The English cases cited shew that just such letters as this were held sufficient as notices of action, but they are decisions of Courts of co-ordinate jurisdiction, and should not be followed here, where the circumstances are vastly different. The English Act from which this was copied, has there been construed liberally in favor of the servant; but our Act should not be so liberally interpreted. There is an enormous liability upon employers, and the difference between the capital of employers of labor in England and in this province should not be lost sight of. Three years' wages of a workman which is the sum recoverable here, would in many cases represent the whole of a year's profit of the employer. Sec. 10, sub-sec. 6 of our Act gives the form of notice to be used, a provision not found in the English Act, which confines the notice more than under the English Act. Our Legislature must be taken to have been aware of the English and Scotch decisions, and to have purposely made our Act more rigorous in its scope.

As to the negligence, there is no evidence upon which the jury could find that Somers was the plaintiff's boss. The principle of the Act is, that the principal is only liable for the act of his vice-principal. The third subsection of section 3, is governed by the second. The construction which should be placed upon the third subsection is, that it must be shewn that the orders of the person to whose orders the plaintiff was bound to conform, were negligent.

On the question of superintendence, I refer to *Shajers v. The General Steam Navigation Co.*, 10 Q. B. D. 356; *Robins v. Cubitt*, 46 L. T. N. S. 535, and *Weblin v. Ballard*, 17 Q. B. D. 122; and on the question of defective appliances to *Thomas v. Quartermaine*, 17 Q. B. D. 414.

June 18th, 1887. BOYD, C.—As to the notice of action, it is impossible to distinguish this case from *Stone v. Hyde*.



9 Q. B. D. 76, a decision of a Divisional Court, which we are bound to follow. The letter there held to be sufficient as a notice was very similar to the letter here. It was there laid down that the Act was passed for the benefit of workmen, and that it must receive a liberal construction. In my view, the Chief Justice was wrong in giving it the rigorous construction that he did.

Upon the question of negligence, the evidence brings the case within sub-sec. 3 of sec. 3.

The evidence sufficiently shews *prima facie* that Somers was in control and charge of the particular machine at which four men worked. The owner directed Somers to give directions in the operation of the machine, by which Cox was *quoad* the other man in a subordinate position. When the latter called out "all right," it was not a word of command to Somers, but a word of obedience, to shew that he had done it as he was told. By negligence Somers brought down the plunger too soon, and caused the accident. The argument is, that to make the employer liable the order should be *per se* negligent; but the English Judges have not so construed it. If while in obedience to orders injury arises through the negligence of the one giving the orders, it is sufficient. No specific order at the time of the injury is requisite—general prior orders suffice: *Millward v. Midland R. W. Co.*, 14 Q. B. D. 68.

This case should have been sent to the jury, and there should now be a new trial, with costs of the former trial and of this motion to be costs to the plaintiff in any event.

FERGUSON, J., I agree as to the notice, and I think there was evidence to go to the jury under sub-sec. 3. Cox was obeying the instructions of Somers; there is no contention that he disobeyed instructions. The non-suit should be set aside, and there should be a new trial, with costs, as directed by the Chancellor.

*Order accordingly.*

A. H. F. L.

This case is to be carried to the Court of Appeal.—REP.

## [CHANCERY DIVISION.]

## McPHAIL v. McINTOSH.

*Will—Construction—General intention in favor of a class—Particular intention in favor of individual—Possession—Devise to possessor without title—Estate tail.*

One J. McP. lived upon lot 26, of which his father A. McP. was owner from 1826 till 1878, when he died, leaving twelve children him surviving. A. McP. died in 1841, having by will devised lot 26 to J. McP., but adding: "He is not to sell or dispose of the said lands, nor any timber or wood now growing on the said lot; on the contrary, the land is to devolve on the most deserving of his children according to the discretion of my executors, that is to say, after his own death." In 1869, J. McP. conveyed the north half of lot 26 in fee to the defendant. The executrix of A. McP. made no selection as to who was the most deserving of his children on whom the land should devolve. Nevertheless the plaintiff, a son of A. McP., now laid claim under the above devise to seven-twelfths of the lot, being his own share and six other shares which he had acquired.

*Held*, affirming the decision of Rose, J., that he was entitled to judgment in respect to seven-twelfths of the land, for that J. McP. only took a life-estate under the said will, under which he must be held to have taken, as he did not disclaim the benefit of it, and had not acquired title by possession at the time of his father's death; and though no selection had been made among the children of A. McP., the Court would carry out the general intention in favour of the class by holding that the estate descended on the twelve children of J. McP.

Per BOYD, C.—There was no estate tail given to J. McP. under the will, for (1) "children" in it had its primary meaning of descendants of the first generation only; and (2), the children were not to take as a class, in the first instance, but only those out of that class to be indicated by the executors as the most deserving.

THIS action was one for recovery of certain land under the circumstances set out in the judgment.

The action was tried at Cornwall, on April 28th, 1887, before Rose, J.

*Leitch*, for the plaintiff, referred to *Peterborough Real Estate Investment Co. (Limited) v. Patterson*, 13 O. R. 142; *Jeffrey v. Scott*, 27 Gr. 314; *Theob. on Wills*, 3rd ed. p. 249-52.

*J. MacLennan*, Q. C., for the defendant, cited *Fleming v. McDougall*, 27 Gr. 459; *Little v. Billings*, 27 Gr. 353; *Tyrwhitt v. Dawson*, 28 Gr. 112; *Jordan v. Adams*, 6 C. B. N. S. 748; *Jarm. on Wills*, 4th ed. pp. 361, 373.

June 1st, 1887. ROSE, J.—This was an action for the recovery of land, being the north half of lot 26, concession 4, Range 6, township of Cornwall.

One Archibald McPhail, in 1826, bought the north half of lot 26, 100 acres, from one Ronald McGillis, and resided on the adjoining lot 25, until his death in the spring of 1841.

His son James McPhail married in 1825, and lived on lot 26 from 1826 until his father's death, and thereafter until his own death in October, 1878.

A stone fence formed the boundary between the lands occupied by father and son, but did not form the true boundary, and lines produced from its termini intersected the true boundary line and threw part of lot 25 into the possession of the son, and part of lot 26 into the possession of the occupant of lot 25.

A portion of lot 26, as I understand the evidence, was called the "big meadow," and was not occupied by James in his father's lifetime.

By will, dated in 1841, Archibald made the following devise:

"I give and bequeath to James, my son, that 100 acres which he now occupies, being No. 26, only that he is not to occupy or have that part of the said lot on the east side of the stone fence which is now as a division line between his farm and mine, and that that stone fence is to be considered a boundary line, and be continued all through between the two farms. He is not to sell or dispose of the said lands, nor any timber or wood now growing on the said lot; on the contrary, the land is to devolve on the most deserving of his children according to the discretion of my executors, that is to say, after his own death."

Some time after the death of Archibald, Kate, (as she was called by the witnesses,) his daughter, and who as executrix alone proved the will, and James had a law suit about the boundary line, and Alexander McIntosh said in evidence that the line was run by Kate and James according to the old fence, James taking part of 25 and losing part of 26.

The same witness stated that James claimed all of lot 26 during his father's lifetime, except about 15 or 20 acres, that is, as I understood, the "big meadow."

That witness was James' brother-in-law—James having married his sister.

James did not disclaim the benefit under his father's will, and must, I think, be held to have taken under it, especially as the will gave him more than he was in possession of prior to his father's death. I do not, however, rest upon that fact, but think that without a disclaimer, he having no title by possession at the time of his father's death, his subsequent holding must be held to have been under the will and not against it.

I have to determine the estate that James took under his father's will, for, in February, 1869, he conveyed the north half of lot 26 to the defendant, Donald J. McIntosh, who claims title in fee simple under that conveyance, while the plaintiff, as a son of James, claims to be entitled under the provisions of the will.

Prior to the Wills Act the words of the devise, "I give and bequeath to James my son," without more would not have given him an estate in fee simple, and the provision, "where any real estate is devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator has power to dispose of by will" is only to apply in case "no contrary intention appears by the will." (Sec. 30, R. S. O. ch. 106.) As put by a learned Judge, the onus is shifted by the statute, so that since the Act it must be made to appear that the intention was not to pass the whole estate, whereas prior to the statute it had to be made to appear that the intention was to pass the whole estate.

He, the testator, provided that James should sell neither the land nor the growing timber, but that "on the contrary the land is to devolve on the most deserving of his children, according to the discretion of my executors, that is to say, *after his own death.*"



I cannot feel any doubt that the testator did not intend that James should have an estate in fee simple to which would have been attached or incident the power to sell both timber and land.

I am of the opinion that he only intended to give him an estate for life, and after his, James's, death the testator desired his, the testator's, executors, to select the most deserving of James's children as the one on whom the estate should devolve.

Unfortunately, the testator's daughter and executrix, Kate, died in 1882 or 1883, without having made any selection.

Can the Court now perform the duty thus cast upon her? Did the will shew an intention to provide for a class, *i. e.*, all the children of James, or only some one of the class?

Is the case brought within the rule laid down by Lord Chancellor Cottenham in *Burrough v. Philcox*, 5 My. & Cr. at p. 92 (1840), as follows: "When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class." He adds: "When such an intention appears, the case arises, as stated by Lord Eldon in *Brown v. Higgs*, 8 Ves. 574, of the power being so given as to make it the duty of the donee to execute it; and, in such case, the Court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit."

In *Burrough v. Philcox*, the learned Chancellor held that a direction to dispose of all my real and personal estate "among my nephews and nieces, or their children, either all to one of them or to as many of them as my surviving child shall think proper," justified him, the Chancellor, in giving effect to the intention, which appeared to him to be sufficiently apparent upon the will, of giving the property to the nephews and nieces and their

children, subject to the selection and distribution of the survivor of the son and daughter, and stated at p. 95, that "they all constitute the class to take all the property as to which no such selection and distribution has been made."

He relied upon the authority of *Brown v. Higgs*, 4 Ves. 708, 5 *ib.* 495, 8 *ib.* 561. There the bequest was to such children of the testator's nephew Samuel Brown as John Brown *should think most deserving, and as would make the best use of it*: or to the children of his nephew, William Augustus Brown, if any such there should be.

John Brown died in the testator's lifetime. The decree declared that in consequence of the death of John Brown in the testator's lifetime, the rents were well bequeathed in trust for all the children of Samuel Brown *and* the children of William Augustus Brown, if there were any.

The case was twice heard before Lord Alvanley, as reported in 4 Ves. 708, and 5 Ves. 495, and before Lord Eldon upon appeal as reported in 8 Ves. 561, and affirmed in the House of Lords: *Sugden on Powers*, 8th ed. p. 590.

Lord Alvanley said that he considered the bequest as equivalent to saying that he gave to the children with a power to John Brown to select any he thought fit, and to exclude the others; and that the fair construction was that at all events the testator meant that the property should go to the children: 4 Ves. at p. 718.

In *Harding v. Glyn*, 1 Atk. 469, *White & Tudor*, L. C. 6th ed., vol. 2, p. 1077, H., by will, gave a leasehold house and furniture, goods and chattels therein, &c., to his wife; but did desire her at or before her death to give the same unto and amongst such of his own relations as she should think most deserving and approve of. It was held that the undisposed of goods ought to be divided equally among such of the relations of the testator as were his next of kin at the time of the death of his wife (1848).

In *Penny v. Turner*, 2 Phillips 493, the will provided as follows: "At the decease of my said mother, I will and devise that all the said estates and property shall be divided amongst my three sisters, Jane Stevens, Elizabeth

Turner, and Harriet Penny, or their children, in such proportions as my said mother shall appoint by her last will or by any deed in writing made by her in her lifetime."

The Lord Chancellor, (Cottenham) said, at p. 475 : "I am not called upon to make any alteration or addition to the will, which the Court never does without necessity. The executor might say to whom the fund should be given, the parents or the children ; but the Court has not that discretion ; it has only to say what class is to take, and then the distribution must be equal. \* \* The mother had power to distribute the property as she thought best between the three sisters and their children." He stated that the decision did not turn upon the word "or" being construed to mean "and," but upon the principles above referred to. He held that the property went to the three sisters *and* their children.

All the cases are collected in the notes to *Harding v. Glyn*, *supra*.

*Theobald's Law of Wills*, 3rd ed., pp. 248 to 252, may be referred to.

In the will before me, the words "the most deserving of his children" may be taken to refer to one only, and the intention of the testator may have been to have his daughter select the most deserving son of James to take the farm ; and I would have thought that he had no intention to give the farm to all James's children. If I hold that his intention cannot now be carried into effect, and further that the children of James cannot take under the clause, the effect would be that the remainder or reversion would be undisposed of, and would descend upon the heirs of Archibald, which certainly would be quite as foreign to the intention of the testator as to give it to children of James.

I think I must hold that the case comes within the rule above quoted.

The result is, that the plaintiff will be entitled to a declaration that he is entitled to seven out of twelve shares of the estate which descended on the twelve children of

James, he having purchased or obtained a conveyance of six-twelfths.

On the 23rd of August, 1864, James executed, in favour of his son John, a deed, in the statutory form, of the land in question—for what purpose is not clear, unless it was to effectuate an intention expressed in the hearing of the witness Thomas Cleary to give the farm to John.

In September, 1868, John executed, in favour of his father, a deed, also in the statutory form, which was registered on February 19th, 1869. On February 12th, 1869, James executed, in favour of the defendant Donald J. McIntosh, a deed, also in statutory form, of the same property, and this deed was registered on February 19th, 1869.

I think it would not be an unfair inference to hold that it was the intention of John as well as of his father James, that McIntosh should take by the deed an estate in fee simple, and so I think he is entitled to one-twelfth interest in the farm, being John's share.

On the evidence, I find that the defendant Donald J. McIntosh paid \$1,500 for the farm in good faith.

I am not disposed to make his loss heavier than the observance of well settled rules require.

The litigation has become necessary through the doubts arising upon the terms of the will and the non-exercise of the trust imposed upon the testator's daughter.

Neither party has wholly succeeded. The plaintiff has sought to deprive the defendant of any claim upon the property, and the defendant has opposed the plaintiff's claim.

No doubt it will become necessary to have the farm sold and the proceeds divided.

I think the costs may fairly be ordered to be paid out of such fund as may thus be realized, and which must be paid into Court subject to the parties entitled proving their claims. They are declared entitled to an interest in property for which they have not laboured.

Such an order should not be made without the interests of the other heirs being represented.



I will hear counsel as to the form of judgment upon the findings above set out.

The defendant moved by way of appeal to the Divisional Court, and the motion came on for argument on June 23rd, 1887.

*Moss*, Q. C., for the defendant. Our contention is, that James being in possession at the time of his father's death, the statute began then to run in his favour. *Rose*, J., held James was in under the will. James's acts shewed an intention against the will. All the evidence is opposed to the idea that he was holding under the will, and indicates that he was holding adversely to the will. If he was passive he was holding under the will: *Re Defoe*, 2 O. R. 623; but here he was not passive. There is no question that he knew about the will: *Re Dunham*, 29 Gr. 258.

The other point is, with reference to the estate taken under the will, and our contention is, that that estate was by virtue of the rule in *Shelley's Case*, an estate in fee or in tail: and "children" should be read "issue." The only difficulty is, as to the power of selection. It is to the children, subject to be limited by the power of selection. It falls on all the children, because it is a devise to them all: *Brown v. Higgs*, 4 Ves. 708; reheard, 5 *ib.*, 495; 8 *ib.* 561; *Harding v. Glyn*, 1 Atk. 469. The chief question was, whether it was a power or a trust. In the absence of the power being exercised, it is a devise to all the children. An intestacy was manifestly not intended. We have a devise of a life estate to the parent with remainder to children. [BOYD, C.—But this was upon a contingency.] The testator's intention was that (if no selection was made) all the children were to take: *Roper v. Roper*, L. R. 3 C. P. 32; *Broadhurst v. Moins*, 2 B. & Ad. 1; *Trash v. Wood*, 4 My. & Cr. 324; *Fuller v. Chamier*, L. R. 2 Eq. 682; *Haldeman v. Haldeman*, 40 Penn. 29; *Theob. on Wills*. 3rd. p. 314.

*A. J. Cattanach*, for the plaintiff. It is of the essence of an estate tail that the tenant for life should be able to bar the entail and dispose of the property; but in this case there is a provision that he shall not dispose of the property. The use of the word "contrary," clearly shews the testator's intention not to allow him to dispose of the property. Every will must speak for itself. I refer, however, to *Re Ontario Loan and Saving Co. and Powers*, 12 O. R. 582; *The Peterborough Real Estate Investment Co. v. Patterson*, 13 O. R. 142; *Jeffrey v. Scott*, 27 Gr. 314. This case is not distinguishable from a gift over to strangers.

*Moss*, in reply. If this is an intestacy under the will, the plaintiff would not be heir-at-law. If there be no intestacy, our construction of the will should prevail for the defendant.

June 29th, 1887. *Boyd, C.*—The intention of the testator was, to give no more than a life estate to his son James, and after his death, he meant the land to go to the most deserving of James's children, (of whom there were twelve,) according to the discretion or selection to be made by the executors of his will. The executors made no selection, and it is now argued that the rule in *Shelley's Case* applies so as to give James an estate in fee simple or in tail.

I think "children," has in this will, its primary meaning of descendants of the first generation only, and is not to be read as meaning issue or heirs of the body. These children were all in existence at the date of the will, and a benefit was contemplated to the most deserving of them.

Nor can there be an estate tail for another reason. The children generally are not to take as a class of persons in the first instance, but only those out of that class to be indicated by the executors as the most deserving. Failing the exercise of this form of selection, and only then, do the whole of the children come in so as to effectuate the general intention of the testator to keep the estate in the family. The construction, therefore, of

this will is, that the devise in remainder to the children at large is contingent upon there being no selection made out of the children by the executors; but the will itself does not give to all the children as a class, but only to the most deserving. There is no provision to be found giving the land to all the children in case the executors fail to select the most deserving. In such a case the rule is laid down very clearly in *Borrough v. Philcox*, 5 My. & Cr. 73, 92, and other cases in *Watson's Comp. of Eq.*, ed., vol. ii., p. 923. Thus, when there appears to be a general intention in favour of a class, and a particular intention in favour of individuals of that class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of that class, by fastening a trust upon the property for the benefit of the individuals in equal shares as tenants in common. The latest decision is in *Watson v. Duguid*, 24 Ch. D. 244.

In my opinion the conclusion of the learned Judge should not be disturbed, but affirmed, with costs.

FERGUSON and ROBERTSON, JJ., concurred.

A. H. F. L.

## [COMMON PLEAS DIVISION.]

## BULL v. THE NORTH BRITISH CANADIAN INVESTMENT COMPANY AND THE IMPERIAL FIRE INSURANCE COMPANY.

*Insurance (fire) — Mortgage clause — Payment of loss to mortgagees — Right of mortgagor to discharge — Statutory conditions — Mortgage — Proofs of loss.*

Under a covenant in a mortgage the mortgagee effected an insurance in the Queen Insurance Co. for \$6000, and transferred the policy to the mortgagor. The mortgagee, not having received the renewal receipt within three days before the expiration of the policy as required by the mortgage, effected an insurance of \$5000 with the Imperial Insurance Co., and by a subsequent arrangement the Queen policy was allowed to lapse. In 1880 a fire occurred and an amount was paid by the insurance company which was applied on the mortgage reducing it to \$1750, and the policy was reduced to that amount. The policy was then cancelled, and an application made by the investment company for a policy for said sum. The policy was to be, and was, issued in the name of the owner, stated in the application to be the plaintiff. The premiums were paid by the plaintiff. Attached to the policy was the mortgage clause whereby the insurance, as to the mortgagees' interest only, should not be invalidated by any act of the mortgagor; and if payment was made to the mortgagees and, as to the mortgagor no liability therefor existed, the company as to such payment should be subrogated to the mortgagees' rights under all securities held collateral to the mortgage debt. In 1882 a fire occurred and the insurance company paid the investment company the \$1,750. The plaintiff claimed to have his mortgage discharge; but the insurance company disputed this, setting up that the plaintiff had no claim under the policy; and that having paid the investment company they were subrogated to their rights.

*Held*, that the plaintiff was entitled to the benefit of the money paid and to have his mortgage discharged, unless he had done something to forfeit his rights; but that there was no forfeiture, certain grounds of avoidance set up by the defendants not being tenable.

*Klein v. Union Fire Ins. Co.*, 3 O. R. 234, followed.

*Held*, also, following *Sands v. Standard Ins. Co.*, 27 Gr. 16, a mortgage was not an *alienation*, and therefore did not come within the third statutory condition.

Proofs of loss were furnished by the investment company which were accepted by the insurance company who paid them the amount of the loss without requiring proofs from the plaintiff.

*Held*, that the insurance company could not set up the absence of proofs by the plaintiff.

THIS action was brought to compel the investment company to give a discharge of a mortgage made by the plaintiff to them; the defence being that they had been notified by the insurance company not to do so, but to hold the said mortgage for their benefit. The insurance



company in their statement of defence alleged that as the mortgage in question was to the extent of \$1,750, discharged by them under a policy of insurance, they were entitled to be subrogated to that amount in the place of the original mortgagees.

The action was tried before Rose, J., without a jury, at Toronto, at the Fall Assizes of 1886.

At the trial, judgment was given in favour of the plaintiff. It was, however, understood that as there were several questions of law to be decided, the whole case should be fully argued before the Divisional Court.

In Michaelmas Sittings, a motion was made accordingly.

During the same Sittings, December 4, 1886, *Osler*, Q. C., supported the motion, and referred to *Castellain v. Preston*, 8 Q. B. D. 613, 11 Q. B. D. 380; *Omnium Securities Co. v. Canada Fire, &c., Ins. Co.*, 1 O. R. 494; *Sands v. Standard Ins. Co.*, 27 Gr. 167; *McQueen v. Phoenix Mutual Fire Ins. Co.*, 4 S. C. R., 660; *Compton v. Mercantile Ins. Co.*, 27 Gr. 334; *Shaw v. St. Lawrence County Mutual Ins. Co.*, 11 U. C. R. 73; *Lyon v. Stadacona Ins. Co.*, 44 U. C. R. 472; *Sly v. Ottawa Agricultural Ins. Co.*, 29 C. P. 557; *Laidlaw v. Liverpool and London, &c., Ins. Co.*, 13 Gr. 377; *Dickson v. Provincial Ins. Co.*, 24 C. P. 157; *Park v. Phoenix Ins. Co.*, 19 U. C. R. 110; *Gilchrist v. Gore District Mutual Fire Ins. Co.*, 34 U. C. R. 15; *Springfield Fire, &c., Ins. Co. v. Allen*, 43 N. Y. 389; *Fitzgerald v. Gore District Mutual Ins. Co.*, 30 U. C. R. 97; *Phillips v. Grand River Farmers' Mutual Ins. Co.*, 46 U. C. R. 335.

*MacLennan*, Q. C., and *Urquhart*, for the investment company, referred to *Rayner v. Preston*, 18 Ch. D. 1; *Ulster County Savings' Institution v. Leake*, 73 N. Y. 161, 165; *Sheldon on Subrogation*, sec. 237.

*Robinson*, Q. C., and *Miller*, contra, referred to *Story on Agency*, 9th ed., secs. 191, 217; *Mahew v. Forrester*, 5 Taunt. 615; *Sherly v. Williams*, 1 Doug. 316; *Worthington v. Bearse*, 12 Allen, Mass., 382; *Wood on Insurance*, secs. 329, 413; *May on Ins.*, 2nd ed., sec. 267, 365, 464, 468;

*Pratt v. New York Central Ins. Co.*, 55 N. Y. 505 ; *Kernochan v. New York Bowery Fire Ins. Co.*, 17 N. Y. 428 ; *Porter on Ins.* 169 ; *Bunyon on Fire Ins.*, 3rd ed., 242, *et seq.*

March 12, 1886. GALT, J.—The facts are, I may say, undisputed. It was admitted that the plaintiff in 1877 borrowed a sum of money from the investment company and gave a mortgage.

The mortgage contains a stipulation that the mortgagor will insure for not less than \$10,000, and that evidence of such insurance having been effected shall be produced to the general agents of the investment company at least three days before the expiration thereof, otherwise the company may provide therefor. The plaintiff did effect an insurance with the Queen Insurance Company for \$6,000, and in other insurance companies for \$4,000, and transferred the insurance in the Queen's to the investment company. On the 7th August, 1878, "Thomas Wills, trustee for estate of George L. Bull," paid the Queen Insurance Company the renewal premium, as appears from a receipt attached to the policy ; but in the meantime the investment company not having received the renewal receipt three days before the day of payment, availing themselves of the clause in the mortgage, had effected an insurance in the name of the plaintiff, but without his knowledge, on the mortgaged property, with the Imperial Insurance Company for the sum of \$5,000 ; and there were other insurances to the extent of another \$5,000. After this was done there was a discussion between the parties, and the policy in the Queen's was allowed to lapse.

I have referred to the receipt attached to the policy in the Queen's as showing the payment was made by "Thomas Wills, trustee for estate of George L. Bull." Bull had on 28th November, 1877, made an assignment to Messrs. Glass and Wills of a considerable quantity of land, to be held in trust and sold for the benefit of his creditors ; but the lands mortgaged to the investment company were not included, nor did the mortgage debt appear in the schedule of debts,

and moreover the policy now in question was not then in existence, so the deed of trust has no bearing on the question now before us.

In 1880 a fire occurred, and a considerable sum was paid by the different insurance companies which was applied in reduction of the mortgage money. After this had been done, the balance of the insurance money covered by the Imperial Insurance Company was \$1,750.

On the 7th of August, 1880, the original policy for \$5,000 was cancelled, and an application was made by the investment company, in their own name, for an insurance for \$1,750, "policy to be in the name of the owner," (the owner is stated in the application, "owned by G. L. P. Bull,") in consequence of which the policy now in question was issued in the name of the plaintiff. Attached to the policy is a renewal receipt for the premium, dated 6th August, 1881. This is in the name of the plaintiff.

It was admitted at the trial that all the premiums had been paid by the plaintiff. In February, 1882, a fire occurred, and the insurance company paid the \$1,750; and it was admitted that, including this sum, all the mortgage money had been paid by the plaintiff. The plaintiff now claims that the investment company should give him a discharge of the mortgage, while the insurance company claim they are, under the circumstances I am about to consider, entitled to a transfer of the mortgage to the extent of the \$1,750 paid by them. The investment company disclaim any interest.

In the policy it is stated, "Loss, if any, payable to the North British Canadian Investment Company (limited), as per printed conditions attached and identified by the signatures of general agents."

These conditions are :

#### MORTGAGE CLAUSE.

"It is hereby especially agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

"It is also provided and agreed that the mortgagees shall notify the company of any change of ownership, or increase of hazard, (not permitted by this policy to the mortgagor or owner,) on each renewal of this policy, and sooner if the same shall come to the assured's knowledge.

"And it is further agreed that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, said company shall at once be legally subrogated to all the rights of the mortgagees, under all the securities held as collateral to the mortgage debt, to the extent of such payment, etc., etc."

It is under these clauses the insurance company claim they are entitled to be subrogated to the rights of the investment company to the mortgage.

It must be borne in mind the application for this policy was made by the investment company, without communicating with the plaintiff; but in the application it was stated the policy was to be to the plaintiff. The fire occurred in February, 1882. In the observations I am about to make, I use the term defendants as applying to the insurance company alone, and not to their co-defendants, the investment company.

The sixth statement of defence is briefly, that the policy is subject to the statutory conditions, and that there was a violation of those conditions, in this that the plaintiff was not interested in the property as the owner thereof, but had conveyed his interest in the same, by deed, dated on or about the 28th November, 1877, to certain parties named Glass and Wills, and was not then the owner thereof. The answer to this defence is, that the property insured was not included in that deed, and this policy was not then in existence.

The seventh defence is under the 3rd statutory condition, and avers that on the 23rd August, 1881, the plaintiff granted and conveyed his equity of redemption therein to one Wills, which the company say was a change material to the risk within the conduct or knowledge of the assured, and was not notified in writing to the company, &c., whereby the policy became void.

On referring to the deed in question, it will be found that it is not a conveyance of the equity of redemption, but



is a mortgage which embraces not only the property insured but a number of other properties. On referring to *Wood* on Insurance, p. 539, we find it stated: "The sale of an equity of redemption is an alienation, and so is any sale, whether voluntary or by operation of law, that divests the assured of all interest in the property; but a conditional transfer does not avoid the policy, because an insurable interest still remains. A mortgage is not an alienation unless expressly conditioned to be, because the assured still retains the legal (equitable) title, and a consequent insurable interest." I am therefore of opinion the objection fails. See *Sands v. Standard Ins. Co.*, 27 Gr. 167.

The eighth defence is, that after the policy was effected, the investment company, under a power of sale in their mortgage, exposed the mortgaged property for sale, and the said property was knocked down to one Wills, whom the company claim to be the owner thereof, and therefore the said policy becomes void.

It was proved at the trial that although the investment company did offer the said property for sale, and that the same was knocked down to the said Wills, the sale was objected to and never carried out; and the company have since, with the consent and approval of the said Wills, placed the money received from him to the credit of the mortgage debt of the plaintiff. There was no actual sale, and it was proved that the right to carry out the sale was disputed by the plaintiff on the ground that Wills was not the highest bidder, at all events the sale never was completed.

I am, therefore, of opinion this objection fails.

The ninth defence is, that the said Wills, after the said sale, either on his own account or as assignee or agent of the plaintiff effected an insurance in the Phoenix Insurance Company without notice to the defendants.

At the trial it was proved that after the intended purchase by the said Wills, and after he had paid a considerable sum to the investment company, he did effect an insurance in his own name and for his own benefit, and that neither

the investment company nor the plaintiff had any notice thereof.

I am, therefore, of opinion this objection fails.

The tenth defence is, that the plaintiff did not comply with the statutory conditions with respect to proofs of loss. The answer to this is, that the policy in question was arranged between the investment company and the defendants, and it was shewn that no objection as to proofs of loss not being made by the plaintiff was raised by the defendants, who accepted the proofs furnished by the investment company, without requiring any proofs from the plaintiff.

By the 2nd section (not statutory condition) of the Act to secure uniform conditions in policies of fire insurance, it is enacted, "Where by reason of necessity, accident, or mistake, the conditions of any contract of fire insurance on property in this Province, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with, or when after a statement of proof of loss has been given in good faith by or on behalf of the insured in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time; or where for any other reason the Court or a Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proofs or amended or supplemental statement or proof, (as the case may be) shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into."

It is sufficient to say that the company have paid the loss in this case, and what may be the effect of the non-compliance of any of the conditions of the policy, will call for consideration on the 11th defence which is really the subject matter of this litigation.

The eleventh defence is based on what is called "The Mortgage Clause," and which I have already set forth. The claim of the defendants is: "That in consideration of the third paragraph of the last mentioned agreement, notwithstanding that no liability existed upon their part, paid over to their co-defendants the amount of the said policy on the sole condition that they shall be subrogated as therein provided; and they therefore claimed the subrogation and assignment referred to in the said agreement."

There is no doubt the defendants claim to be subrogated to the rights of the mortgagees; but this was not a policy granted to them, it was granted to the mortgagor. It is true there is a provision that "The loss, if any, is payable to the investment company as per printed conditions attached and identified by the signature of the general agents."

It was also shewn that when the company made application for the policy, the defendants were notified the policy was to be in the name of the plaintiff as owner; and it was also proved that all premiums had been paid by him. This would not of itself be of any consequence as regards the defendants; but it was shewn that as between the defendants, the investment company were in the habit of transacting their insurance business with their co-defendants, and it was of course important for them to stipulate, as is done by the first condition, "that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor"; and it was also reasonable for the defendants to stipulate that if in consequence of any such act or neglect of the mortgagor, they would have a good defence to any action brought by him, and had under the above stipulation been obliged to pay the loss to the mortgagees, they should be to that ex-

tent subrogated to their rights. The effect, however, is that it leaves the mortgagor in the same position as he was, but if the insurance company pays the loss to the mortgagees, under such circumstances that the mortgagor could not have recovered from them, they shall be entitled to be subrogated to the rights of the mortgagees, just as if the mortgagees had insured as mortgagees, when unquestionably the insurance company would be entitled to such subrogation.

The question, therefore, now before us is, whether the plaintiff could himself have recovered against the defendants?

I have already considered the grounds of objection taken by the sixth, seventh, eighth, and ninth statements of defence.

The 10th objection is, that no proofs of loss had been furnished by the plaintiffs.

I have set out the statutory enactment bearing on this question. It was proved at the trial that a claim of loss was made by the investment company; due notice of the fire was given by them; no objection was made by the defendants as to want of notice, or proof of loss by the plaintiff; the whole matter was settled between the two defendants; and it appears to me the case is within the statutory enactment, that "where for any other reason the Court, or a Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable, that the insurance should be deemed void, or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement, or proof or amended or supplemental statement, or proof, (as the case may be,) shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into."

The defendants knew that their co-defendants were acting under the condition contained in the mortgage, which enabled them to effect insurance on behalf of the plaintiff; they were notified by their co-defendants, when application was made for this policy, that it was to be in



the name of the plaintiff, and they knew the premiums were paid by the plaintiff, as appears from the renewal receipt attached to the policy. It was proved at the trial that this policy was effected without the knowledge of the plaintiff, that is to say, he was not aware of the company with which the insurance had been effected, although he knew the investment company charged him with premiums of insurance, so that it would, in my opinion, be "inequitable" that this defence should prevail. It would in all cases enable the defendants to claim a subrogation; they might in every case, where their co-defendants had effected an insurance upon property mortgaged to them, do so, by doing as was done in the present instance, accept proofs of loss from the investment company, and then settle with them, and claim a subrogation on the ground that they were not liable to the mortgagor because he had not furnished them with proofs of loss as required by the statutory provisions.

It appears to me that the case of *Klein v. Union Fire Ins. Co.*, 3 O. R. 234, is in point, and that the plaintiff is entitled to receive a discharge of his mortgage from the defendants, The North British Investment Company.

The rule will therefore be to enter judgment ordering the North British Investment Company to discharge the plaintiff's mortgage.

The plaintiff claims a reference as to the state of accounts between himself and the North British Investment Company. If this be required, there shall be a reference to Mr. Winchester to take the account; the costs of such reference to abide the result. The defendants, The Imperial Fire Insurance Company, are not to be made parties to such reference.

The plaintiff is entitled to his costs against both defendants.

ROSE, J.—I agree to the judgment of my learned brother Galt. As between the plaintiff and the investment company, such company undertook to make a contract for the

plaintiff. If it was a valid contract, then the plaintiff is entitled to the benefit of the money paid under it, unless he has done something to forfeit his right, and I agree that he has not done anything to forfeit such right.

If the investment company did not make a valid contract, then it and not the plaintiff must bear the loss. So that the plaintiff, as against the investment company, is entitled to have the mortgage discharged.

The insurance company cannot, as against the plaintiff, have a right to an assignment of the mortgage, unless the plaintiff had no right to claim the benefit of the money paid to the investment company.

If it has any claim against the investment company under its contract, it may seek its remedy, but the plaintiff has no interest in such a dispute.

The plaintiff is entitled to a judgment in the terms stated by my learned brother.

CAMERON, C. J., concurred.

*Judgment accordingly.*

---

## [COMMON PLEAS DIVISION.]

## UNITED STATES EXPRESS COMPANY V. DONOHUE.

*Action to recover stolen money—Evidence of accomplices—Corroboration—Proof “without reasonable doubt”—Misdirection—New trial.*

The plaintiffs claimed that a sum of money had been stolen from them by defendant, and brought an action to recover the money or land in which it had been invested. The evidence in proof of the charge was that of accomplices, and in corroboration the evidence of detectives who stated that defendant admitted the charge. The learned Judge charged the jury that if it was a criminal trial he should be compelled to tell them that, though they might convict on the evidence of accomplices, it was never safe to do so, and there should be some corroborative evidence to turn the scale against the presumption of innocence. He further said that this was not a criminal case, but yet he could not say the rule ought not to be applied, perhaps not precisely in the same way, but they were to exercise their common sense as to how far they would credit or discredit the evidence of accomplices. He also stated that when he said that corroborative evidence was necessary when accusations were sworn to by accomplices, he desired them to understand that the more particular point of corroboration should be the identity of the person accused, and unless the corroborative evidence identified the defendant with the stealing on the occasion and under the circumstances detailed in the evidence it would not be corroborative. His identity should be contained in the evidence of corroboration.

*Held*, [GALT, J., dissenting], that the effect of the charge and the impression it was calculated to leave on the minds of the jury, fairly considered, was that the evidence of accomplices in crime, which crime gave rise to the civil action, ought not to be credited or relied on, unless corroborated, and was misdirection; and there was also misdirection in charging that the corroboration must be as to the identity of the party charged with the criminal act.

It was urged that the misdirection, if any, was immaterial, because the defendant could not have been present taking part in the stealing of the money, because an alibi was proved: but *Held*, that the effect of the evidence as to the alibi had upon the jury depended much upon the credit to be attached to the accomplices' evidence, and as it could not be ascertained on what ground the jury found for the defendant, it was impossible to say that the jury may not have discredited the accomplices evidence because of the alleged want of corroboration.

The learned Judge also in his charge, after stating that the plaintiff in an action had to make out his case, added, that is, he has to satisfy them that the evidence is sufficient to cause them to believe “without any reasonable doubt” that the claim the plaintiff makes is correct, and, if he fails to do so, there should be a verdict against him.

*Per* CAMERON, J. While of opinion that this was putting the plaintiffs' obligation more burdensomely than the law required, he could not say the learned Judge was without the warrant of authority for so charging. *Thurtell v. Beaumont*, 1 Bing. 339, and *Richardson v. Canada West Farmers' Ins. Co.*, 17 C. P. 341, commented on.

*Per* ROSE, J. The charge on this point was quite correct.

THIS was an action tried before O'Connor, J., and a jury at Welland, at the Spring Assizes of 1886.

The plaintiffs claimed that a sum of money had been stolen by the defendant John Donohoe, from the plaintiffs at Susquehanna, in the State of Pennsylvania, on the 20th June, 1883: that a few days afterwards the defendant John Donohoe with a portion of the money purchased and improved an hotel at Fort Erie: that the defendant Donohoe conveyed the property to his wife, the defendant Eliza Jane Donohoe, who conveyed to the defendant Joseph Madden. These conveyances were claimed to have been made without any consideration and with notice of the circumstances. This was denied by the defendants.

The action was brought to recover the money or the property on which the money was expended, and to set aside the conveyances from Donohoe to his wife, and from his wife to Madden.

The jury found for the defendants.

The case was previously tried and a verdict entered for the defendants; and a new trial was directed.

The evidence so far as material, is set out in the judgment

The jury found a verdict for the defendants, and judgment was accordingly entered for them.

In Easter Sittings, May 19th, 1886, *J. K. Kerr*, Q. C., obtained an order *nisi* to set aside the verdict and judgment, entered for the defendants, and for a new trial, on the law, evidence, and the weight of evidence; and for misdirection, on the grounds set out in the judgment.

During Michaelmas Sittings, November 29, 1886, *J. K. Kerr*, Q. C., and *T. D. Cowper*, supported the order, and referred to *Best on Evidence*, 7th ed., sec. 95; *Cooper v. Slade*, 6 H. L. Cas. 746, 772; *Greenleaf on Evidence*, 14th ed., vol. i., sec. 5 & 7, vol. iii., sec. 29; *Best on Presumptions*, sec. 190; *Re Monteith*, 10 O. R. 529, 545.

*Osler*, Q. C., contra, referred to *Chalmers v. Shackell*, 6 C. & P. 475; *Vaughton v. London and North Western R. W. Co.*, L. R. 9 Ex. 93, 96.



March 12, 1887. GALT, J.—This case was tried before, and a verdict found for the defendants.

The jury have again found a verdict in favour of the defendants, and considering the case involves a charge of a very serious crime against the defendant Donohoe, it would be contrary to the practice of the Courts to send the matter again to a jury unless we are satisfied some mistake had been made by the learned Judge, who presided at the trial, in his charge to the jury, which may have led to a miscarriage of justice.

Mr. Kerr based his rule principally, if not entirely, on this question ; and this matter was argued by Mr. Osler, who contended there was nothing wrong in the charge ; but, in addition, contended that, even if such were the case, the Court should not interfere, for the defence relied on proof of an *alibi*, so that if the jury were satisfied on that head it was a matter of no consequence whether the learned Judge was or was not strictly accurate in his observations respecting the evidence of some of the witnesses who were called by the plaintiffs.

The evidence on which the plaintiffs relied was that of Hampton, Proctor, and Dubuque. I will refer to the evidence of the detectives subsequently. Now, as regards Hampton, he was not what may strictly be called an accomplice, because, according to his own evidence, he was not actually a participant in the robbery, not because he did not wish to be, but because Donohoe said he could not take him in.

After stating that Donohoe borrowed money from him :  
“ Q. Did he say what he wanted it for ? A. Yes ; he said he wanted it to get away to where he intended to make a big haul of money ; and I asked him the amount of money ; and he said from thirty to forty thousand dollars, and if I get it I will give you a thousand dollars. I asked him, if he had such a good job as that, I would like to go into it myself and help him to get it. Q. What did he say ? A. He said he could not do that : that those two that were with him would not agree : that the local man wanted to bar all

out of it but himself, and he would not be satisfied to have any body else go in."

As respects Proctor, he was by his own admission an accomplice; and moreover had good cause of enmity against Donohoe, for it was through the contrivance of Donohoe and Dubuque he was enticed across the line and arrested by Pinkerton. Dubuque was also an accomplice.

Can it be said then that such evidence was not open to suspicion; and that in order to induce the jury to accept it the learned Judge should have called their attention to the question of corroboration?

The first objection taken by *Mr. Kerr*, is, that the learned Judge told the jury, "that is not a *commercial* case and yet I cannot say to you that the rule ought not to be applied (as in *commercial* cases) that corroborative evidence was necessary when accusations were sworn to by accomplices." This is evidently a clerical error in copying the rule, what the learned Judge did say was "that this is not a *criminal* case, &c., \* \*

The second objection is, that he said "If you are depending on the evidence of Proctor and Dubuque, and those who are acknowledged accomplices, I should hesitate very much to advise you to find a verdict for the plaintiffs in the case. I think I should find (feel) myself bound as if in a criminal trial to say that, although you might find that it could only be because of the circumstances corroborating their evidence, there is this great difficulty in cases of this kind especially when it is one of a civil character affecting the rights of property. You have then to consider what is there corroborative of the evidence of the accomplices."

This is not exactly what the learned Judge said, what he did say was, "I think I should feel myself bound as if in a criminal trial to say, that, although you might find that it could only be because of the circumstances corroborating their evidence; for where fellows come into the box here in the presence of the Court and jury and declare themselves thieves and scoundrels, and, although they may

claim that they are trying to reclaim themselves, who is to tell whether they are not hypocrites, and still thieves and scoundrels, and how is a jury to say upon their oaths they believe such men in one way or the other; and there is the great difficulty in cases of this kind, especially when it is one of a civil character affecting the rights of property. You have then to consider what is there corroborative of the evidence of the accomplices."

The rule then objects "and in otherwise directing the jury that there was no distinction between the rules of evidence as regards the evidence of accomplices in crime and those applied in civil cases; and in directing the jury accordingly."

On referring to the charge I find that in his opening remarks to the jury as respects the difference between criminal and civil cases in regard to the evidence of accomplices, the learned Judge said, "There is no doubt at all, and both counsel in their able addresses to you have admitted the principle, that if this was a criminal trial I should be compelled to tell you, that, although a jury may convict a person of an offence upon the evidence of one who admitted himself to be an accomplice, that it is never safe to do so, and that there should be some corroborative evidence in order to turn the scale against the presumption of innocence." No objection is or could be taken to this statement of the law; but Mr. Kerr, contends this does not apply to civil cases, and that the learned Judge in reality made "corroboration" a condition which in the present case the jury should require before they accepted the evidence of the accomplices, because he had told the jury, as in the first objection set forth, "this is not a criminal case, and yet I cannot say that the rule ought not to be applied as in criminal cases that corroborative evidence was necessary where accusations were sworn to by accomplices." Thus intimating to them that such corroboration was necessary in the present case.

But the learned Judge does not stop there. He proceeds: "A person who admits himself to have been as guilty as

the person who is being tried, may have a motive in swearing against that person—a motive to the effect that he himself may benefit by it. But it is necessary also to remember that you must judge of that evidence by all the circumstances. An accomplice, of course, may tell the truth, or he may tell what is not true, and you can only judge of that by carefully examining the circumstances which he relates, regarding carefully the consistency or inconsistency of his story, remembering all the time that he may have a bias, and allowing for that at the same time. This, however, is not a criminal case; and yet I cannot say to you that the rule ought not to be applied, perhaps not precisely in the same way, but you are to exercise your common sense as to how far you will credit or discredit the evidence of a man who swears he was an accomplice.”

It appears to me that upon reading the whole of the passage, it cannot be said the learned Judge directed the jury positively that the rule as to corroboration applied as if this was a criminal case. It is true he expressed an opinion as to the credit to be given by the jury to the evidence; but he did not tell them that unless the evidence was corroborated, they should disregard it. He expressed his own opinion as to the witnesses which he had a perfect right to do, but left it to the jury to say, “how far they would credit or discredit the evidence of a man who swears he is an accomplice.”

The rule then objects that the learned Judge directed the jury when speaking of the corroborative evidence in this case (that of the Pinkerton's). “The corroborative evidence is that of the Pinkertons, but the Pinkertons are detectives; they are men who are pursuing another class of men, and sometimes it is very difficult to tell whether the detective or the thief is the greater rascal;” “their testimony is to be regarded in that way.”

This is not what the learned Judge did say. He said, “The corroborative evidence is that of the Pinkertons. Well, the Pinkertons are detectives, and the law books



tell us from the experience of Courts, from the experience which Judges have with regard to them, that even their evidence is to be accepted with some degree of caution: that they are following a particular profession: that their object is, when they catch hold of a man and want to convict him, that their object is to do so; *and though I should not for a moment, and will not for an instant, point to any thing said by either of the brothers as untrue*, it is possible always that the mind may be so biased in a man of that kind that he may state what he did not distinctly understand, or may over-state, or may use his invention to some extent to obtain the object of his pursuit. In fact, they are men who are pursuing another class of men, and sometimes it is very difficult to tell whether the detective or the thief is the greater rascal. But, be that as it may, I suppose it would be impossible to conduct society, or keep it in order, without the use of such men, and their testimony is to be regarded just in that way." I can see nothing objectionable in these remarks; and I am satisfied if the attention of the Court had been called to this passage, this rule would not have been allowed in the form in which it now is.

There are some objections taken in the rule as to the remarks made by the learned Judge respecting the evidence of Donohoe. I do not think it necessary to refer to them. The man was examined before the jury, and it was their province to weigh his manner and his testimony.

There was another objection taken, viz., as to the identity of the money taken with that used in the payment for the property. I can see nothing in the charge to sustain such an objection.

This case has been twice tried, and in each case there was a verdict for the defendants. The defence was based on an *alibi* which, if proved to the satisfaction of the jury, rendered it impossible for Donohoe to have stolen the money.

On the first trial certain questions were submitted to the jury; the first was, did John Donohoe steal the money from the express company? The answer was, "no."

At the trial now in question it does not appear that any specific questions were left to them, and they have again found a verdict which they could not have done had they believed him to have done so.

It must be borne in mind that the claim of the plaintiffs is based on the charge that on a certain day Donohoe stole a certain sum of money at Susquehanna. The defence by Donohoe is, that he did not, and in proof of his assertion he called witnesses to prove that he could not.

This was the sole question which the jury had to try. In support of the plaintiffs' charge they produced witnesses, who confessed to their own guilt, and stated that, Donohoe was with them. They also called other witnesses to prove admission of guilt made by him. On the other hand, Donohoe swore positively that he was not guilty, and called witnesses to establish an *alibi*. The jury have, on both trials, found in favour of the defendants.

In *Hunter v. Corbett*, 7 U.C.R. 75, which was an application for a third trial in a case of alleged fraud, Robinson, C.J., in delivering the judgment of the Court, said, at p. 79: "The defendant has moved for another new trial, on the law and evidence. If it can be considered that there was really anything to be weighed by the jury before they could pronounce the transaction to be fraudulent—in other words, if the question of fraud or no fraud was, under the circumstances, a question for the jury and not for the Court—then, whatever may be our opinion as to the side to which the weight of evidence inclined, the cases are strong against our interposing a second time."

The learned Judge, although he expressed a strong opinion as to the necessity of corroboration of the testimony of the accomplice did not direct the jury to find a verdict for the defendants on that ground. He submitted the case to them, and also submitted the question of the *alibi*. This was the ground relied on at both trials, and on both occasions the jury have found for the defendants.

I do not see how we can interfere.

CAMERON, C. J.—As this case has already engaged the attention and consideration of two juries, both of which found against the plaintiffs, it is with regret I have come to the conclusion there was such a miscarriage in law at the last trial as makes it necessary the opinion of a third jury should be taken upon the issues joined.

The learned Judge in my judgment misdirected the jury in the way he submitted to them the question of credit to be attached to the testimony given by the plaintiffs' witnesses, who were accomplices in crime alleged to have been committed by the defendant, and out of which the plaintiffs' cause of action, if any, arises.

The effect of the charge and impression it was calculated to leave on the minds of the jury fairly considered would be that the evidence of accomplices in crime, where such crime gives rise to a civil action in which such accomplices are examined as witnesses, ought not to be credited or relied upon unless corroborated. If such be the effect of the learned Judge's direction to the jury, it was not a proposition of law that can be upheld, as it is opposed to the authority of adjudged cases.

The charge, as far as it is necessary to be detailed as bearing upon this question, was as follows:

"I shall not attempt to go through the evidence at any length, or do more than point out to you the principal or material points to which the evidence ought to direct your attention. It is my duty to tell you what I think the law is, and it is your duty to determine what the facts are, and you are to determine those facts from the evidence which has been given in the witness box, and read to you from the depositions taken in other places. And in doing that it is not only your privilege but it is your duty to consider the character of the parties who have given evidence, whether here or under commission. You are not bound to believe what every one swears to, because there is such a thing in human nature as saying what is not true, and the duty of the jury is to remember that the principle of human actions is human nature, that human nature is the generating principle of human actions, and therefore they ought to take into account, ought to be careful when wit-

nesses are called in their presence, to observe their manner, the mode in which they give their evidence, and to judge of their truthfulness as well as they can from that in connection with the surrounding particulars or facts of the case. And so it is with regard to the evidence taken on commission. When the evidence is taken on commission, you are deprived of the advantage of seeing the countenances and seeing the manner of the persons examined; but as a general rule you can gather pretty well from his statements and comparing it with the statements of others and comparing it also with the surrounding circumstances, as to how far you can place confidence in the statements of such witnesses or not. There is no doubt at all, and both counsel in their able addresses to you have admitted the principle, that if this was a criminal trial I should be compelled to tell you that although a jury may convict a person of an offence upon the evidence of one who admits himself to be an accomplice, that it is never safe to do so; that there should be some corroborative evidence in order to turn the scale against the presumption of innocence. A person who admits himself to have been as guilty as the person who is being tried, may have a motive in swearing against that person—a motive to the effect that he himself may benefit by it. But it is necessary also to remember that you must judge of that evidence by all the circumstances. An accomplice, of course, may tell the truth, or he may tell what is not true, and you can only judge of that by carefully examining the circumstances which he relates, regarding carefully the consistency or inconsistency of his story, remembering all the time that he may have a bias, and allowing for that at the same time. This, however, is not a criminal case, and yet I cannot say to you that the rule ought not to be applied, perhaps not precisely in the same way, but you are to exercise your common sense as to how far you will credit or discredit the evidence of a man who swears he was an accomplice, and admits he was an accomplice, or the evidence of a man who says he desired to be an accomplice, and who also admits that he lent money for the purpose of committing the crime. Between those who were immediately concerned in the act and the person who admits that he was lent money for the purpose and was desirous of acting as partner, I can draw no distinction. I do not know whether you can or not, but that is a matter for your consideration.



When I say that corroborative evidence was necessary where accusations were sworn to by accomplices, I desire that you should understand that the more particular point of corroboration should be the identity of the person who is accused, and unless the corroborative evidence identifies this defendant, Donohoe, with the stealing of that package from the safe on the occasion, and under the circumstances detailed to you in evidence, it would not be corroboration. His identity should be contained in the evidence of corroboration. Now, it is a rule that the plaintiff in an action has to make out his case, that is, he has to satisfy the jury, where it is a trial by jury, that the evidence is sufficient to cause them to believe, without any reasonable doubt, that the claim the plaintiff makes is correct, and if he fails to do that there should be a verdict against him. The plaintiff can only recover by the strength of his evidence. If there is a failure of the evidence and only a cause of suspicion the jury ought not to accept that, but to render a verdict for the defendant. Now, besides the evidence of the accomplices—you must remember that in fact you are dealing with a den of thieves—how far one is to be believed in preference to the other. Well, if you are depending on the evidence of Proctor and Dubuque, and those who are acknowledged accomplices, I should hesitate very much to advise you to find a verdict for the plaintiff in the case. I think I should feel myself bound, as if in a criminal trial, to say that, although you might find that it could only be because of the circumstances corroborating their evidence; for when fellows come into the box here in the presence of the Court and jury and declare themselves thieves and scoundrels, and although they may claim that they are trying to reclaim themselves, who is to tell whether they are not hypocrites, and still thieves and scoundrels; and how is a jury to say upon their oaths that they believe such men in one way or the other; and there is the great difficulty in cases of this kind, especially when it is one of a civil character affecting the rights of property. You have then to consider what is there corroborative of the evidence of the accomplices. In the first place I will tell you that I do not believe there is any difference whatever between Donohoe, Dubuque, and Proctor as far as their character is concerned, as far as their past lives are concerned. They have evidently been by their own acknowledgment thieves and scoundrels together, and it is very difficult to say when any one of them is telling the truth, and yet Donohoe did seem

to make his statements in a way—he may be a practised hand, I do not know—but he did seem to make certain statements in a way that would convey the belief that he was at all events sometimes telling the truth.

The corroborative evidence is that of the Pinkertons. Well, the Pinkertons are detectives, and the law books tell us, from the experience of Courts, from the experience which Judges have with regard to them, that even their evidence is to be accepted with some degree of caution : that they are following a particular profession, that their object is, when they catch hold of a man and want to convict him, that their object is to do so ; and though I should not for a moment and will not for an instant point to anything said by either of the brothers as untrue, it is possible always that the mind may be so biased in a man of that kind that he may state what he did not distinctly understand, or may over-state, or that he may even use his invention to some extent to obtain the object of his pursuit. In fact they are men who are pursuing another class of men, and sometimes it is very difficult to tell whether the detective or the thief is the greater rascal. But, be that as it may, I suppose it would be impossible to conduct society or keep it in order without the use of such men, and their testimony is to be regarded just in that way. It is compared with circumstances, has to be taken with that consideration with which you take all things in all ways of the kind, and just give it such weight as you think under of the circumstances it is entitled to. That because a detective swears to a particular fact you are bound to believe it, is what I cannot tell you ought to be the case ; at the same time their evidence is useful sometimes, and in many cases necessary, and when consistent with the facts of course is bound to have its weight in the minds of the jury who are trying the case. Then if you believe the Pinkertons, Donohoe did acknowledge that he was the principal actor in this robbery ; and if he was, then he had possession of the largest portion of the money. You ought to be satisfied that there is no reasonable doubt in your minds upon the evidence, that you are firmly of the belief that such and such are the facts, or that they are not the facts, and you find accordingly. I do not know that I can say any more to assist you, but let you retire to your jury room and consider your verdict. You are to just satisfy yourselves in that way. Discharge from your minds all feeling as far as men possibly can, consider the evidence in itself, consider the character of the

witnesses, consider how far you can give credence to their evidence, and where there is a contradiction which of them you can believe. I should also mention the evidence as to the alibi. That evidence you have to consider also. If it is true that Donohoe was at Fort Erie on the evening of the 20th, at seven or eight o'clock, it would seem to be impossible that he could have been at the place where this robbery was committed; and you have to consider the character of the evidence which is brought here and told in open Court as to that alibi. If you believe them I should say that the other was impossible; the time tables show that he could not have been there at that time, and it would be also somewhat inconsistent with the evidence of those who say they were accomplices of the crime as to his being there before, and their having a consultation as to the manner in which they got away afterwards. That is the last thing you have to consider. Come down to that, and then if you believe the captain and the three subordinates, and they have sworn to certain facts and given their reasons; if you come to the conclusion that they ought to be believed in preference to the others, you ought to give a verdict for the defendants, and if you are at that stage of the case in serious doubt, such a doubt as causes your minds to oscillate between what you ought to say, you ought to give the defendants the benefit of that doubt. I know that the captain did not mention any particular time.

Mr. *Kerr*.—Your Lordship ruled on the question as to the testimony of accomplices in criminal cases, that that is to be applied in civil cases; you said: 'I can draw no distinction.' Your Lordship will find that that law is not made good. Your Lordship will find a distinction, and there is a reason for the distinction; in civil cases the defendant can be put in the box; in criminal cases his mouth is shut.

HIS LORDSHIP.—I know that; but I am not satisfied that that is law in a case wherever there is wrong.

Mr. *Kerr*.—It is a question of fact that is to be tried, and that fact is for the jury to accept or not, and there is no reason why the defendant should have the benefit of the doubt, as a prisoner is according to our law entitled to. If the plaintiff makes out the case, and that is made out on testimony that the jury believe, they should be told they can believe that without being told that it is not sufficient to believe an accomplice."

The jury could hardly avoid thinking that the Judge was presenting to them the necessity of corroboration of the evidence of the witnesses Dubuque and Hampton as matter of legal practice if not of legal requirement, when he said: "There is no doubt at all, and both counsel in their able addresses to you have admitted the principle, that if this was a criminal trial I should be compelled to tell you that although a jury may convict a person of an offence upon the evidence of one who admits himself to be an accomplice, that it is never safe to do so; that there should be some corroborative evidence in order to turn the scale against the presumption of innocence. \* \* This, however, is not a criminal case; and yet I cannot say to you that the rule ought not to be applied, perhaps not precisely in the same way, but you are to exercise your common sense as to how far you will credit or discredit the evidence of a man who swears he was an accomplice, and admits he was an accomplice, or the evidence of a man who says he desires to be an accomplice, and who also admits that he lent money for the purpose of committing the crime. \* \* When I say that corroborative evidence was necessary where accusations were sworn to by accomplices, I desire that you should understand that the more particular point of corroboration should be the identity of the person who is accused, and unless the corroborative evidence identifies this defendant, Donohoe, with the stealing of the package from the safe on the occasion and under the circumstances detailed to you in evidence, it would not be corroboration. His identity should be contained in the evidence of corroboration." When he directed them that he could not say that the rule ought not to be applied, there was the implication that it ought to be applied, or of doubt as to whether the law did not require its application; which might be accepted by the jury as an intimation to them that although they might if they chose credit the alleged accomplices, they ought not to do so.



The learned Judge, I think, was probably labouring under this impression of the requirement of the law himself, as at the close of his charge, Mr. Kerr objected: "Your Lordship ruled on the question as to the testimony of accomplices in criminal cases, that that is to be applied in civil cases; you said I can draw no distinction. Your Lordship will find that that law is not made good. Your Lordship will find a distinction, and there is a reason for distinction; in civil cases the defendant can be put in the box; in criminal cases his mouth is shut. The learned Judge: I know that; but I am not satisfied that that is the law in a case where there is wrong."

Mr. *Best*, in his work on Evidence, sec. 95, lays it down upon the authority of *Newis v. Lark*, Plowd. 412, that "there is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision."

This is a proposition which was referred to by Mr. Justice Willes with approbation and adopted by him in *Cooper v. Slade*, 6 H. L. Cas. 771.

In *Re Monteith*, 10 O. R. 529, the learned Chancellor, at p. 545, considers the question of the necessity for the corroboration of the evidence of accomplices given in civil cases, with the result, after a review of the authorities, that no corroboration is necessary.

The authorities, civil and criminal, quoted by him, fully sustain the conclusion at which he arrived. Crime at one time in legal history constituted a disability, and rendered the person convicted incompetent to give evidence. The incompetency has been removed by legislation, and the testimony of such a person must now be received and weighed as the testimony of other witnesses, and believed or discredited in the same way as the evidence of all witnesses must be credited or discredited, from the impression it conveys to the mind of the jury or judge possessed of the knowledge that the witness is to a certain extent discredited on account of his previous character or crimi-

nal conduct. I think it would not be improper for a Judge to call the attention of the jury to the previous character of a witness as affecting his credit where that character has been bad or criminal; but that is a different thing from indicating that the witness should not be believed unless his evidence is corroborated, and corroborated as to the identity of the party against whom he testifies with the perpetrator of the criminal act; that is, that corroboration in respect of collateral matters that would lend probability to the testimony of the accomplices, would not be such corroboration as the law requires.

This is not, I think, an accurate statement of the requirements of the law or practice as to corroboration where corroboration is rendered necessary.

In some cases corroboration is required by particular statutes or special rules of Court in particular actions which indicate the character of the corroboration. Such was the opinion of Dr. Lushington in *Simmons v. Simmons*, 5 Notes of Ca. Ecc. & Mar. 325, 11 Jur. 830 referred to by the learned Chancellor in *Re Monteith*, at p. 547.

But in ordinary cases where the practice requires corroborative evidence, corroboration in such matters as will tend to strengthen the probability of the truth of the evidence of the witness whose evidence requires corroboration will be sufficient.

In *Regina v. Boyes*, 1 B. & S. 311, 320, Wightman, J., thus stated his opinion of the requirement of the law: "It is not necessary that there should be corroborative evidence as to the very fact; it is enough that there be such as shall confirm the jury in the belief that the accomplice is speaking truth."

To the like effect is the case of *Regina v. Bannerman*, 43 U. C. R. 547.

It was contended by Mr. Osler that the evidence of an alibi shewed it was not possible that the defendant could have been present taking part in the stealing of the money of the plaintiffs; and, therefore, there was no ground for a new trial, even if the learned Judge did err in his direc-

tion to the jury that accomplices required to be corroborated ; but the effect the evidence of an alibi should have upon the jury depended much upon the credit to be attached to the evidence given by the alleged accomplices ; and as it cannot be ascertained on what ground the jury found in favour of the defendants, it is impossible to say that the jury may not have discredited the testimony of the accomplices in consequence of that testimony not having been, in view of the learned Judge's charge, sufficiently corroborated to enable them to rely upon it.

There is no doubt their evidence was corroborated by the admission made by the defendant to the Pinkertons ; and so, if corroboration were necessary, that corroboration existed. This Court is not, therefore, in a position to say there has been no miscarriage at the trial affecting the parties on the merits, so as to bring the case within the authority of *Cook v. Grant*, 32 C. P. 511 ; *Bernard v. Coutellier*, 45 U. C. R. 453.

The learned Judge at the trial also charged correctly that the plaintiff in an action has to make out his case ; but then he added : " That is, he has to satisfy the jury, where it is a trial by jury, that the evidence is sufficient to cause them to believe, *without any reasonable doubt*, that the claim the plaintiff makes is correct, and if he fails to do that there should be a verdict against him."

This direction was also objected to by Mr. Kerr ; and I am of opinion it was putting the obligation of the plaintiffs more burdensomely to them than the law requires. The burden of proof unquestionably rested upon the plaintiffs, but they were not bound to do more under the burden than to satisfy the jury, as reasonable men, by evidence that their claim was well founded ; in other words, that the weight of the probabilities preponderated in support of their contention.

I am quite aware that there are English decisions and Canadian decisions which go the length of holding the jury ought to be satisfied that the crime imputed is as fully proved as would justify them in finding the defendant

guilty of a criminal offence : *Thurtell v. Beaumont*, 1 Bing. 339 ; *Richardson v. Canada West Farmers' Ins. Co.*, 17 C. P. 341.

The last named case is rested upon *Thurtell v. Beaumont*, and some *nisi prius* decisions in Carrington and Payne, which do not, in my judgment, go the full length of supporting the conclusion reached. *Thurtell v. Beaumont* does support the ruling of the learned Judge in the present case ; but it is briefly reported, and no reasons are assigned by the Court.

Park, J., at the trial of the action, which was on a fire insurance policy, with the defence set up that the plaintiff had wilfully set fire to the premises, directed the jury that in order to their finding a verdict against the plaintiff they ought to be satisfied that the crime imputed to him was as fully proved as would justify them in finding him guilty on a criminal charge for the same offence. Taddy, Sergt., moved for a new trial ; and urged "that in order to discharge the defendant from liability, it was not necessary the jury should entertain the same certainty with respect to the plaintiff's guilt as would justify them in convicting him on a criminal charge. In this case, as in any other, they would, without reference to the defence set up, be warranted in finding against the plaintiff if he failed to make out his case to their entire satisfaction ; and that might happen in various ways, even though arson were never proved against him." Then the report alleges : "But the Court were clearly of opinion that the direction was proper, and refused to grant a rule on this ground."

No reasons whatever were assigned for the refusal more than the bald one that the charge was right.

This was not a satisfactory manner of disposing of so important a question—and at variance with the decision in *Newis v. Lark*, Plowd 412—though the direction of Park, J., was not, as in this case, that the jury must be satisfied without reasonable doubt, it was equivalent thereto, if the jury knew what their duty would be in a criminal case ; and I think it is fair to assume that they did know the



law required them to give to the accused the benefit of any reasonable doubt as to his guilt.

In *Magee v. Mark*, 11 Ir. C. L. R. 449, 458, (1861,) Pigot, C. B., refused to direct, at the request of counsel in an action to recover penalties under the Corrupt Practices Prevention Act, 1854, (17 & 18 Vic. 102,) if the jury "entertained a reasonable doubt on the evidence, they ought to give the benefit of that doubt to the defendant, and find a verdict for him." There was a verdict for the plaintiff, which the Court afterwards refused to disturb.

And Chief Baron Pigot gave a most elaborate judgment reviewing exhaustively the authorities. "In reference to the case of *Thurtell v. Beaumont*, he made the following observations, at p. 468: "I may observe, first, in *Thurtell v. Beaumont* the learned Judge did not direct the jury that they ought to give the benefit of a doubt to the plaintiff in that action." Then he proceeded: "It has been argued that the jury ought to have been told to give the benefit of a doubt to the defendant, because until all doubt shall have been removed, the presumption of innocence stands un rebutted. But this argument begs the question; for it assumes that the presumption in a civil case cannot be rebutted while a doubt remains. To lay down that as a general proposition would be, I believe, to affirm a doctrine perfectly new, and calculated to create the greatest difficulty and embarrassment in trial by jury. No case has been cited in which it was ever held that a Judge, in a civil case, ought, as a matter of direction to a jury, to tell them they ought to give the benefit of a doubt to either party; and I am not aware of any instance in which, in a civil case, that has been so decided except in the case of alleged adulterine bastardy. There the rule of law, resting on special grounds, is, that where any opportunity exists of access in wedlock, the presumption must prevail that access *has* taken place, unless the tribunal before which the question arises is satisfied without reasonable doubt, that it has not."

The learned Judge then refers to the cases in which the law is so laid down in this particular class of cases, and

goes on, at page 469: "The jury, although they may consider the case a doubtful one, may, upon weighing the evidence and finding their minds sufficiently influenced by the preponderance of it at one side, *be satisfied of the fact*, by that preponderance. If they are, they ought to find in the affirmative of the allegation. If, on due deliberation, they are not so satisfied, the burden of proof is not sustained, and they ought to find in the negative. But to lay it down as a rule for the government of juries, that they must have positive certainty to warrant their finding for one party, but that they may find, on a reasonable doubt, for the other, would, in a vast number of cases, involve an absolute perversion of justice."

This is certainly a very strong, forcible, and convincing way of putting the argument against the propriety of directing the jury that they must find for the defendant if the evidence does not satisfy them, beyond reasonable doubt, that the plaintiffs have proved as against the defendant what they were bound to establish, to succeed.

To hold in a civil action where the defendant's liability flows from an act which involved a felony or other criminal offence, a greater degree of certainty is necessary than would be required where crime had not been committed, is to place the greater wrongdoer in a position of greater security, and to deprive the person wronged of the right that would be accorded to him against a less criminal defendant. Against the proposition that there can be such a distinction favourable to the criminal, common sense and natural justice revolt.

While, therefore, I cannot say that the learned Judge in this case is without the warrant of authority in this country for charging the jury on this point as he did, there is no case which in terms approves of his direction.

I think, notwithstanding Chief Baron Pigot points out that in *Thurtell v. Beaumont*, 1 Bing. 339, the direction was not that the jury should be satisfied without reasonable doubt, it was substantially to that effect; and the charge of the learned Judge in this case, cannot probably be said to

be wrong without overruling the judgment of the Court of Common Pleas in *Richardson v. Canada West Farmers Ins. Co.*, 17 C. P. 341, 343.

I, therefore, rest my judgment that there should be a new trial on the misdirection as to the necessity for corroborative evidence in support of the evidence of Dubuque and Hampton; but would add, that I think the jury ought not, on the further trial, to be directed any more strongly in favour of the defendant than to charge them that before they can find for the plaintiffs, they must be satisfied as reasonable men by the evidence that the defendant took the plaintiffs' money or participated in the taking thereof.

It may not be found also unworthy of consideration, that in the Courts of the United States there is much difference of opinion upon the question; and Mr. *May*, in his work on Insurance, in treating of the question of evidence to sustain the defence of wilful burning of the premises by the insured, lays it down, in section 583, that reason and the weight of authority are against the soundness of the decision in *Thurtell v. Beaumont*, 1 Bing. 339.

In a note to *Magee v. Marks*, 11 Ir. C. L. R., at p. 469, there is a number of cases collected shewing the language of different Judges in delivering their charges to the jury, in all of which except one, it is said there is no mention of doubt as a ground on which the jury should act in considering their verdict. The distinction between civil and criminal cases, is also pointed out in *Doe d. Devine v. Wilson*, 10 Moo. P. C. 502, 521.

There must be a new trial, with costs to be costs in the cause to the successful party.

ROSE, J.—I concur in the judgment of the learned Chief Justice except in so far as he expresses an opinion against the propriety of the learned Judge telling the jury that the plaintiff must make out his case “without any reasonable doubt.” I venture to think that such direction was quite correct.

I also venture to think there is the same mode of proving a fact in a civil as in a criminal case. The mind must be convinced of the existence of the fact whether that conviction leads to the awarding of damages for a shilling, or capital punishment.

The mind accustomed to set phrases frequently loses its grasp upon them so as to forget their meaning, and repeats them without conscious effort or action, and without staying to examine into and consider their full import.

The phrases "without any reasonable doubt," "presumption of innocence," "no presumption of guilt," are familiar to the ears of all lawyers, and serve in criminal cases to shield many a guilty man from the consequences of his crimes.

The presumption of innocence seems to grow stronger as the accusation becomes the more serious and the punishment the more severe, and does not decrease in force if the accused is young and fair, or otherwise likely to make a claim on one's sympathies.

Does presumption of innocence mean anything more than that no man is presumed to be guilty of any offence until proven to be so? If proven to be guilty, presumption of innocence is gone. The person making the charge undertakes to prove it to the satisfaction of the minds of reasonable men. No man is presumed to have committed a crime, or a trespass, or to owe a debt, merely because it is so asserted.

What is to be guilty of an offence? Is it not simply unlawfully to do what has been forbidden, as, for example, commit an assault, or not to do as commanded, as in case of negligence?

If one unlawfully does that which the law forbids, he is amenable to the punishment provided for such an offence.

A man shoots an animal of small value in a neighbour's yard. An action is brought to recover its value. The Judge or jury must be satisfied that the animal was shot, and that the accused was the person who did the shooting. If the mind is not convinced, if it is not carried by the



evidence to a point where it rests in settled conviction, if it wavers and doubts, it is not satisfied, it is not convinced, and cannot honestly find *upon the evidence* that the accused is guilty. The consequences of a finding may only be a judgment for a few shillings, but no one to whom is committed the duty of finding such fact has any right, because the result may not be serious, to guess at the probabilities and jump to a conclusion.

A man is shot and killed. A person is placed upon his trial for murder. It becomes necessary to prove the fact of the shooting, and the identity of the accused with the person who fired the shot.

Must not the mind travel along the same road, impelled by the same motive power and reach the same point of conclusion, to find the facts as noted in the former case. Is there any different kind of evidence, any different mode of action, any peculiar kind of mental analysis known to man that can be brought into play to ascertain the fact in the latter case which need not be exercised in the former?

Is the presumption of guilt greater in one case than in the other, or the presumption of innocence more in favor of the man charged with the graver offence?

May not one tell juries that if they do their duty they have no responsibility with the result of their verdict, that their oath is to give a verdict in accordance with the evidence—to find the facts according to such evidence—to announce the result that their minds arrive at on such evidence, and that if they hesitate in and turn back from the performance of such a duty by reason of the seriousness of the result, they will be forgetful of the obligation imposed upon them by their oath of office, which requires them to find a true verdict according to the evidence.

May they not be further told that if the evidence fails to bring their minds to a conclusion, if they cannot arrive at a point where they can say on this evidence so and so must be the fact, then that they have a reasonable doubt—that they have not reached the point of decision and that the party, be it the Crown or a subject that has undertaken

to supply the evidence to prove the fact and satisfy their minds as to the same, has failed.

I see no distinction between civil and criminal cases as to such direction, and am unable to see any error in the charge on that point.

I am quite unable to apprehend the force of the observation of Chief Baron Pigot in *Magee v. Mark*, where he says: "But to lay it down as a rule for the government of juries that they must have positive certainty to warrant their finding for one party, but that they may find on a reasonable doubt for the other would in a vast number of cases involve an absolute perversion of justice."

A finding that the plaintiff has failed to prove his case is not at all, of necessity, a finding that the defendant is innocent of the trespass charged, or does not owe the debt due, or in case of a criminal charge is not guilty.

It merely involves the finding that in that action the plaintiff has not established the liability he had undertaken to establish, or, if it be a defence, that the defendant has not established the facts upon which his defence rests.

In short, he upon whom the onus rests, must satisfy such onus by proving the charge or claim to the satisfaction of the minds of reasonable men, so that they may arrive at a conclusion without reasonable doubt, or he must fail in obtaining a finding of guilt or liability, which will not be presumed against any man.

Absolute certainty may not be attained; but as to that I have from time to time been much comforted in remembering a direction that I heard given some years ago by the learned Chief Justice of the Queen's Bench Division, when he in effect told the jury that their duty was not to find the fact, which might be known alone to the Great Judge of us all, but it was to find the fact according to the evidence, and whatever conclusion that evidence led the mind to was the fact for them.

What is a reasonable doubt? Is it not a doubt resting in the mind of a reasonable man, a doubt of a reasoning mind, a doubt of the reason? If it is, then the reason has not been convinced, and the fact has not been proven.

When one does the best he can, and acts on the evidence as his reason or judgment dictates, there will sometimes come to the mind the thought, perhaps after all I may be mistaken, I may have credited an untruthful witness, or the witness may have been deceived, or I may have misapprehended the evidence.

Such a doubt would not be a reasonable doubt, for our mind must act on the evidence of the senses, even though conscious that sometimes the senses may be deluded, and so one must act on oral testimony, although knowing that sometimes error may creep in.

After all may it not come down to this, that while no fact must be found except upon convincing testimony—and upon convincing testimony all facts must be found no matter how serious or terrible the consequences,—yet in cases where the issue is grave, and the results serious, the mind will be more on the alert, the senses quickened, the nervous system strung to a greater tension, and every power and every faculty exerted to an even unusual degree; the road traversed and retraversed to see if any thing has been overlooked or forgotten, so that a mistake may not be made where it cannot be rectified.

In fine, in no case will we act until the judgment is convinced and all reasonable doubt removed, but in very serious cases renewed exertion will be made to avoid any possibility of error or mistake.

*Order absolute for a new trial.*

---

## [COMMON PLEAS DIVISION.]

## GRAHAM v. THE ONTARIO MUTUAL INSURANCE COMPANY.

*Insurance (Fire)—Incumbrance—Representation of agent as to—Estoppel—Just and reasonable conditions—Conditions as to payment of two-thirds value.*

In the application for a policy of insurance against fire, it was stated that there was no incumbrance. The application was filled in by the company's agent. The insured informed him of the existence of a mortgage on the property when the agent told plaintiff that if there was nothing overdue thereon it was not an incumbrance, and, under this belief, there being nothing overdue, the statement was made. A policy was afterwards issued with conditions and variations. The 14th variation was, that if any agent, &c., of the company shall have written or filled up any part of the application, he shall for that purpose be deemed the agent of the insurer and not of the company; and no statement, written or verbal, made to such agent, &c., as to any matter which the enquiries in the application extend should bind the company or affect the company with notice thereof unless stated in the application. The 15th variation was, that any fraudulent misrepresentation contained in the application, or any false statement therein respecting the title or ownership of the applicant or his circumstances, or the concealment of any incumbrance, or the failure to notify the company of any mortgage or incumbrance upon or other change in the title or ownership of the insured property rendered the policy void.

*Held*, [GALT, J., dissenting,] that the defendants were estopped from setting up the avoidance of the policy.

*Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450, and *Hastings Mutual Fire Ins. Co. v. Shannon*, 2 S. C. R. 394, followed.

*Per* GALT, J.—That irrespective of the agent's representation before the issue of the policy, the plaintiff after the issue thereof should, under the 15th variation, have notified the defendants of the mortgage.

*Per* ROSE, J.—The 14th variation was unjust and reasonable on the facts of the case, and possibly generally; and the 15th variation did not apply; but, even if applicable, it was similar in terms to sec. 36 of 36 Vic. ch. 44 (O.), which was considered in *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450.

*Per* CAMERON, C. J.—Whether the 14th variation was or not just and reasonable need not be considered, for it did not profess to provide that the company should not be bound by the agent's representation as to the meaning and effect of the questions in the application; and as to the 15th variation, it was competent for the parties to define what they understood was meant by incumbrance.

The 4th variation was, that in no case should the insured be entitled to recover more than two-thirds the actual value of any building or contents or other property insured; nor in case of further insurance by the insured or other party more than the rateable proportion of two-thirds of the actual value without reference to the date of the different policies; that any general policy on different properties shall be treated as a special policy on each property for the whole amount thereby insured. The insurance was \$100 on barn and stables valued at \$1,200, and \$900 on contents valued at \$3,000.

*Per* CAMERON, C. J., and ROSE, J.—That as to the latter part of the condition referring to further insurance by the insured or other party, it was unjust and unreasonable; but as to the former part thereof, as to the payment of not more than two-thirds of the value of the property insured—which meant at the time of loss—it was just and reasonable.



THIS was an action tried before Armour, J., and a jury, at Toronto, at the Fall Assizes of 1886.

It was brought on a policy of insurance against fire. There were several defences pleaded, and a great deal of evidence given, to which it is unnecessary to refer.

By the 4th paragraph of the statement of defence the defendants alleged : " In the said application (on which the policy was issued,) the plaintiff stated that the said property was not encumbered, and that the only other insurance subsisting upon such property was in the London Mutual Fire Insurance Company, and such statements were false."

5th " Before the date of the application, and before the alleged date of issue of the policy mentioned in the statement of claim, the plaintiff had mortgaged and encumbered the said buildings, and the same continued to be and were mortgaged and encumbered, with the knowledge of the plaintiff, at the said alleged date of issue of such policy, and at the time of the fire mentioned in the statement of claim."

In the application, in answer to question 13, "Is the property encumbered? Answer fully." The answer, was "No."

It was admitted by the plaintiff at the trial that at this time the property had a large mortgage against it.

The defendants also set up that under the 4th variation condition the insured was only entitled to recover two-thirds of the actual value of the insured property.

The facts, so far as material, are set out in the judgments

At the close of the evidence the learned Judge submitted several questions to the jury, among which were the following :

1. "Did the plaintiff inform Conrad House when taking the application for insurance in the Ontario Mutual that there was a mortgage on his property? (House was the agent of the defendants.)" Answer. "If he did not, he had no intention of withholding the information from Conrad House."

2. "Did Conrad House at that time inform the plaintiff, that, although there was a mortgage upon his property, yet if there was nothing overdue upon the mortgage the property was not encumbered?" Answer, "yes."

There were several other questions bearing on other points of the case found by the jury in favor of the plaintiff; and upon the answers generally the learned Judge entered a judgment in favour of the plaintiff.

In Michaelmas Sittings, November 16, 1886, *Macmillan* obtained an order *nisi* to set aside the findings and judgment entered for the plaintiff and to enter judgment for the defendants.

During the same Sittings, December 1, 1886, *McMillan* supported the motion.

*MacLennan*, Q. C., and *Jacobs*, contra.

The arguments and cases cited sufficiently appear from the judgments.

March 12, 1887. GALT, J.—It is plain that the answer given by the plaintiff to the question in the application as respects encumbrances was untrue.

The learned Judge in his charge, as briefly and plainly as possible, stated his opinion on this point as to the right of the plaintiff, in which I fully concur.

He said: "It is very difficult from what took place at the time that application was made to understand exactly what did take place. In the application the question is asked, 'Is the property encumbered? Answer fully.' The answer is 'No.' I will ask you these questions." (The learned Judge read the questions already set out, and then called attention to the evidence of the plaintiff in reference to encumbrances, and continued): "If he, thinking in his own mind that the mortgage if paid up and no arrears upon it was no encumbrance, and told the agent there was no incumbrance, he has to suffer the loss; it is his fault that the company is not made aware. But if he told the agent that there was a mortgage, and then told him that there was

nothing in arrear upon it, and the agent told him that was not the meaning of being encumbered, that that was no encumbrance, then it may be a question whether he cannot recover from the company. If he stated his property was not encumbered, knowing there was a mortgage upon it, and he, thinking that if there was a mortgage upon it, so long as nothing was overdue, it was not an encumbrance even if he thought that in his own mind and so thinking told the agent there was no encumbrance, he would not be entitled to recover, whether through ignorance or otherwise he had led the company to believe the property was not encumbered. If he told House there was a mortgage, but that all arrears were paid upon it, and House told him that was not an encumbrance, and he should answer the question 'no,' then it may be a question whether the company may not be liable, because it was the agent of the company so said."

The jury, as I have already said, answered "no."

The question, therefore, now before us is, whether, under the circumstances as shewn by the evidence, the defendants are liable.

There is no dispute as to the facts. The only question is, whether the evidence sustains the findings of the jury; and, if so, are the defendants affected by what took place when the application was signed?

As the evidence is not very long on this point, I will set it out. The plaintiff in his cross-examination stated as follows:

Q. "Is that your signature" (to the application)? A. "Yes.  
Q. In this application this question is asked: Is this property encumbered? Answer fully. You say 'no.' That is your application to the company; was it encumbered at that time? A. What I understand by encumbered is, if a man has judgment against me, if it is due and not paid I say I am encumbered; that is my opinion; but as long as I have everything else paid up I don't call it encumbrance. Do you think this mortgage is any encumbrance to you; don't you have to pay the interest? A. As long as it is paid, when

it is paid it is no more encumbrance to me. Q. But while it is there, is it not an encumbrance to you? A. When I pay it when it is due I am not troubled any more. Q. When you pay this and it is discharged, you are not troubled with it, but you have not paid it, it is then an encumbrance on your property? A. It is like a note coming due. Q. Was not that an encumbrance upon your property? A. The day I got that insurance we were talking in the kitchen—House and me—and there was a little chap who was partly deaf, and in speaking to him we had to write it down. House asked me—whether he asked me, whether there was an encumbrance, I cannot tell. Q. You signed that paper? A. Yes, that is my signature.”

On re-examination. Q. “You said to Mr. McMillan that Conrad House made out the application for the second insurance? A. Yes. Q. Did he do the writing? A. It was House drew it out. Q. When you came to the question, ‘Is there any encumbrance on this property’? Was any thing said between you about that? A. He asked that, and I said there was a mortgage, but I didn’t think there was any encumbrance because I had everything paid on it. Q. What did you mean? A. That I wasn’t in arrears. Q. Did you explain that to House? A. Not at the time. I told him I was not in debt to any person.”

His Lordship. Did you tell him there was a mortgage? A. I said there was a mortgage, that is all; I said everything was paid up. Q. What did House say when you told him there was a mortgage? A. He was writing, and didn’t say anything.”

Re-cross-examination. Q. “You say you told House when he was filling out that application that there was a mortgage upon the farm? A. I think I told him that there was a mortgage. Q. Will you swear you told him that? A. I think I did. Q. Will you swear you told him that? A. Not positively.”

The agent, House, was examined and I may say briefly that he appears to have led the plaintiff to believe, incredible as it is, that a mortgage on which nothing was due was



not an encumbrance, consequently I cannot say the finding of the jury was contrary to the evidence.

The question then arises whether the defendants are liable, owing to the stupidity, for I can call it nothing else, of the agent and of the plaintiff.

I had occasion to express my opinion on this subject in the case of *Parsons v. Queen Ins. Co.*, 2 O. R. 45. That was a case turning on the statements made by an agent at the time of granting an interim receipt, the fire having occurred before a policy was issued; and I was of opinion that such statements were binding on the company, although contrary to the terms of the policy which the company were in the habit of issuing, on the ground that where the insurance was effected by an interim receipt, "the agent in such cases represents the company as to all matters connected with the insurance until the application for insurance is laid before the company \* \* On the other hand, I am of opinion that all representations made by the agent as respects the terms and conditions on which the insurance is made, are to be treated as made by the company themselves, provided that they do not contradict or vary the conditions of the interim receipt until the policy is issued, after which the assured has an opportunity of ascertaining precisely the terms and conditions of the contract by which they are willing to contract, and if he does not accept these he should give notice to the company and demand repayment of the premium."

Now to apply that to the present case. Assuming that owing to the statements made by the agent the plaintiff was justified in answering in the manner he did, and that because there was nothing overdue on his mortgage at the date of his application, he stated there was no encumbrance on his property; he very shortly afterwards received a policy granted on that application. If he had read the policy he would have seen that it was his duty at once to have informed the defendants of the existence of the mortgage.

By sec. 28 of 44 Vic. ch. 20 (O.), The Fire Policy Act, R. S. O. ch. 161 shall apply to mutual fire insurance companies. In the present case, the company have printed on the policy what are called "statutory conditions," and also "variations in conditions," in compliance with that statute. By the 15th variation it is expressly stated, "any fraudulent misrepresentations contained in the application for this insurance, or any false statement in such application respecting the title or ownership of the applicant, or his circumstances, or the concealment of any encumbrance on the insured property, or on the land on which it may be situate; or *the failure to notify the company of any mortgage or encumbrance upon, or other change in the title or ownership of the said property, &c., shall render this policy void, &c.*"

It is beyond doubt there was a mortgage on this property, and that the plaintiff did not notify the company thereof.

Irrespective, therefore, of the question whether the agent did or did not mislead the plaintiff as to the meaning of the word "encumbrance" in the application, it was plainly his duty, as soon as he received the policy, to have given the company notice thereof.

I am of opinion that the rule should therefore be made absolute to enter judgment for the defendants, with costs.

ROSE, J.—I agree with my learned brother Galt that the finding of the jury that Conrad House, the agent of the defendant company, at the time of the taking of the application informed the plaintiff that although there was a mortgage upon his property, yet if there was nothing overdue the property was not encumbered, was not contrary to the evidence.

There was therefore no concealment of the fact of the mortgage, and the first finding of the jury read with the second negatives fraud on the part of the plaintiff.

The defendant company, therefore, through their agent having mislead the plaintiff, should not be permitted to avoid the policy on any technical grounds—if the Court can consistently prevent such a result.

My learned brother Armour, at the trial, held the 14th variation unjust and unreasonable. If he had not done so I would be prepared to hold, and do hold, it to be unjust and unreasonable against this plaintiff, on the facts of this case, and possibly generally.

It is as follows: "14. If any agent or canvasser for this company shall have written or filled up any part of the application for this insurance, he shall for that purpose be the agent of the assured and not of the company; and no statement, written or verbal, made to such agent or canvasser, as to any matter to which the inquiries in the application extend, shall bind the company, or affect the company with notice thereof, unless stated in such application."

In my opinion such condition is directly opposed to the principles which the Courts held should govern in *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P., 450; *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Parsons v. Queen Ins. Co.*, 2 O. R. 45; and *Quinlan v. Union Fire Ins. Co.*, 8 A. R. 376.

I may here say I desire to adopt the views of Mr. Justice Armour in *Parsons v. Queen Ins. Co.*, at p. 62 *et seq.*, as to the mode of determining when a condition is just or reasonable.

In *Chatillon v. Canadian Mutual Fire Ins. Co.*, the agent filled up the application for an illiterate French Canadian, who truly stated the facts to him as to the title and encumbrances; but in so filling in the agent, without the authority or knowledge of the assured misstated such fact.

It was held that the insurance company, under the circumstances, must be restrained in equity from setting up under the terms of the statute, 36 Vic. ch. 44 sec. 36 (O.), or of the conditions on the policy, the act of their own agent as an avoidance of the policy.

The following extract from the judgment of Mr. Justice Gwynne, at p. 459, will shew that the cases are singularly alike.

"It may well be that, without imputing any fraud to their agent, he inserted opposite the questions as to encumbrances the answers now objected to, under the impression and belief that a claim of a vendor for a lien for unpaid purchase money did not constitute an encumbrance on the property in the sense in which the questions in that behalf in the application were put ; but it would be most inequitable, in my judgment, that the defendants should be permitted to avail themselves, to the prejudice of the plaintiff, of an error of judgment of their own agent, who having received from this illiterate man full and true particulars, did not put them down correctly, but led him to believe, when he procured his mark to the paper, and signed his name to it, that his answers were correctly stated and given. The policy therefore could not be avoided, merely by reason of the terms of the clause of the statute above quoted."

I refer also particularly to the language of Harrison, C. J., in *Benson v. Ottawa Agricultural Ins Co.*, 42 U. C. R. 282, at p. 293 *et seq.*, and of Armour, J., pp. 298-9.

Then is there any condition on the policy which would enable the company to take advantage of this mistake? There is no question in the application as to "mortgages." The question (13) is, "Is the property encumbered? Answer fully"

According to the information obtained from the agent it was not encumbered ; and as to the mortgage which was on the property full information was given.

There is nothing in the application paper to shew that there is no information to be given to the agent orally, or that the agent is not authorized to give information or instructions, or that the company will not be bound by the acts of their agent.

My learned brother Galt is of the opinion that up to the time the policy reached the hands of the plaintiff the company was bound ; but that the policy gave him full notice that it was void for want of notice to the company of the mortgage in question.



There is nothing in the statutory conditions referring to mortgage, encumbrance, or false statement in the application.

Condition 2 would rather mislead than give notice to one who had in good faith given the agent full information. It is as follows: "2. After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out, in writing, the particulars wherein the policy differs from the application;" and condition 21 would not lead the assured to suppose that the scope of the agency was limited. It is "21. Any officer or agent of the company who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance, shall be deemed *prima facie* to be the agent of the company for that purpose."

The variations and additions will, I think, upon examination be found to interpose no obstacle.

The first referring to encumbrances is the 10th; and that clearly does not refer back to the application.

It is as follows: "10. \* \* All notices of other insurances, and of assignments, transfers, encumbrances, changes of title, risk, or alterations required to be given to the company, must be given to the secretary of the company at the head office thereof."

This, in my opinion, refers to matters subsequent to the issue of the policy.

Clause 11 does not apply, as no consent to any encumbrance is set up, and would not, I think, have any reference to the application; for if on information then obtained the company issued a policy its consent would be endorsed. Moreover, it may be that so far as it varies or contradicts condition No. 21 it must be held to be not just or reasonable.

No. 14 I have already dealt with.

No. 15 does not, I think, apply, "Any fraudulent misrepresentations contained in the application for this insurance." On the findings of the jury, there was none.

“Or any false statement in such application respecting the title or ownership of the applicant or his circumstances.” I do not think this has reference to encumbrances, as they are specially referred to immediately after.

“Or the concealment of any encumbrance on the insured property, or on the land on which it may be situate.” There was no concealment. These words do not refer to the application in terms, but are general; and as there is nothing in the application or policy requiring notice to be in writing, the oral notice to the agent prevents the charge of concealment. “Or the failure to notify the company of any mortgage or encumbrance upon, or *other change* in the title or ownership \* \* \* ” This clearly refers to changes subsequent to the policy.

Even if such clause was applicable, it is in terms similar to sec. 36 of 36 Vic. ch. 44, (O.), which in *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450, was held not to be effective to avoid the policy on the facts there set out and above referred to.

If it be held that any of the variations or additions apply to encumbrances so as to be in the plaintiff's way; then on these facts and as to the plaintiff, I hold them not to be just or reasonable.

For these reasons I see nothing in the plaintiff's way to recover as against this objection.

There were other grounds taken in the notice of motion, but not urged or argued, and I do not therefore notice them.

The plaintiff is entitled to recover.

As to the amount.

The body of the contract must, I think, be read simply as a contract to pay the amount of the insurance; the statute provides the manner of endorsing the conditions.

We therefore disregard the clause in the body of the contract providing for payment of amount not exceeding two-thirds the value of the property insured, and turn to the statutory conditions.

Condition 9 provides for payment of a ratable proportion only—in case of other insurance—“if such other insurance remains in force.”

By our judgment in the action of *Graham v. London Mutual Ins. Co.*, 13 O. R. 132, we held that the other insurance did not remain in force, so the 9th condition does not apply, nor does any other statutory condition.

When we turn to the variations we find the 4th as follows: “4. That in no case shall the assured be entitled to recover from this company more than two-thirds the actual value of any building, or contents, or other property insured; nor, in case of further insurance by the assured or other party, more than the ratable proportion of two-thirds of said actual value without reference to the dates of the different policies: that any general policy on different properties shall be treated as a specific policy on each property for the whole amount thereby assured.”

As to the latter part of this condition, which refers to further assurance, I am prepared to hold that it is unjust and unreasonable: 1. Because, to adopt the language of Patterson, J. A., in *May v. Standard Fire Ins. Co.*, 5 A. R. 605, 622, they impose upon the insured terms more stringent and onerous than those attached by the statute to the same subject or incident. See condition 9 *supra*. 2. Because such provision is in its terms unjust and unreasonable. Why should an insurer be subject to have his policy reduced by the act of another without his knowledge or consent? Why should a general policy be treated as a specific policy on each property for the whole amount insured? 3. If the language would include the policy which we have declared invalid it would be unjust and unreasonable.

Then is it just or reasonable that the company should not be bound to pay more than two-thirds of the value of the property insured?

If the insurance had been for say nine-tenths and premium paid on that amount, it might be unjust to pay only two-thirds, and possibly some other state of facts might be

suggested which would make it unjust, but without special facts it does not seem unjust or unreasonable that the insured should bear one-third of the risk, so as to guard against the temptation to commit fraud.

In this case the application discloses insurance of \$100 on the barn and stables valued at \$1,200, and \$900 on contents valued at \$3,000. On such a state of facts the condition seems quite just and reasonable.

The condition does not in terms say two-thirds of the value of the property insured at the time of the loss, but merely of the property insured. I think, however, it must mean two-thirds of the value at the time of the loss, else by removal of goods after insurance the clause would be made inoperative.

The jury found the value of the barn and stable to be at the time of the fire, \$900. Two-thirds of \$900 are \$600. As the insurance was only \$100, the plaintiff is entitled to recover that sum. They found the value of the contents, \$903.25. Two-thirds of that sum are \$602.16. The insurance was \$900. The plaintiff is only entitled to recover the \$602.16.

There will therefore be judgment for the plaintiff for \$702.16, with interest, and costs of suit; and the motion will be dismissed with costs.

CAMERON, C. J.—I agree with my learned brother Rose that the plaintiff is entitled to retain the judgment entered for him at the trial. The finding of the jury on the first and second questions submitted to them is supported by the evidence. This finding in effect is, that as between the plaintiff and the defendant it was understood and agreed a mortgage on which nothing was overdue for principal or interest, should not be deemed an encumbrance.

The only difficulty is, the giving of parol evidence to lessen the general meaning of the words in the written application. The application is not a contract but a representation, in respect of which a contract is entered into; and the defence urged is, that in fact the insured property



was encumbered by a mortgage thereon; and by a condition of the policy, "any fraudulent misrepresentation contained in the application for this insurance, or any false statement in such application, respecting the title or ownership of the applicant or his circumstances, or the concealment of any encumbrance on the insured property, or on the land on which it may be situate \* \* shall render this policy void; and no claim for loss shall be recoverable under it, unless the directors shall then in their discretion see fit by resolution to waive such avoidance."

No doubt a mortgage is an encumbrance on the insured property, within the meaning of the word in insurance contracts. But the word encumbrance, or incumbrance, has many other meanings. In ordinary acceptation it is something that burdens, hinders, or impedes; and it was competent to the parties to the contract to define what they understood was meant to be included in or covered by the word.

If the plaintiff, or the agent of the defendants, are to be believed, it was understood between them that the mortgage existing on the property was not an encumbrance. There was no concealment of the existence of the mortgage. The agent was informed of it, and the company, not the plaintiff, should suffer from the ignorance of the agent.

The principle of estoppel may very properly be invoked to prevent the defendants from setting up that the mortgage in this case was an encumbrance, the existence of which vitiated the policy.

The statement made by the plaintiff in the application that the property was unencumbered, was certainly not fraudulent, nor was it false, as the meaning of the word was explained to him—that is to say on the information imparted to him by the defendants—for the statement of the agent must be regarded as their statement, except in so far as the terms of the policy prevented his statements binding the company.

It is said that the 14th of the variations of conditions has this effect. It is, "If any agent or canvasser for this

company shall have written or filled up any part of the application for this insurance, he shall for that purpose be deemed the agent of the assured and not of the company; and no statement, written or verbal, made to such agent or canvasser, as to any matter to which the inquiries in the application extend, shall bind the company, or affect the company with notice thereof, unless stated in such application."

This very comprehensive provision, as no doubt it was intended to be, does not quite meet the present case. The agent is not by it prohibited from giving to the applicant for insurance information in relation to the meaning of the questions put in the printed form of application.

We will suppose that the insured did not say to the agent that there was a mortgage on the property, but had asked the question of the agent, "Is a mortgage on which there is nothing overdue, or in arrear, an encumbrance?" and the agent then said, "no." Then the applicant filled up the application answering the question: "Is the property encumbered? answer fully." "No." I think it could not be contended successfully by the company, that, as far as they were concerned, they should not be bound by their agent's representation, or be precluded from saying that the statement of the plaintiff that the property was not encumbered was either fraudulent or false.

If the 14th condition is intended to prevent the company being bound by the information its agents may furnish applicants for insurance, who act thereon and have their position changed or affected thereby to their prejudice, unless the company is bound by such information, the condition should be declared unjust and unreasonable.

I think, however, it is not necessary to pronounce it to be unreasonable, as it does not profess to provide that the company shall not be bound by the agent's representations, but merely that communications made to the agent in respect to the inquiries in the application not stated in the answers shall not bind the company, or be deemed notice thereof to the company, though the agent himself fill up the answers.

This does not appear to me to be unreasonable. It is no part of the employment of the agent, as far as the company is concerned, to fill up the application if the applicant asks him for his, the applicant's, convenience to do so. It is his business before he signs it to see that it has been truly and correctly done in accordance with the information given by him to the agent. It would be an entirely different thing to say the company would not be bound by the information the agent may give as to the scope, meaning, and object of the questions submitted to the applicant by the agent.

Assuming the findings of the jury in this case to have been correct, and there was unquestionable evidence to support them, the case is as strong against the defendants as *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450, though it does not appear in this case that the plaintiff, as in that, was illiterate. I think the conclusion I have arrived at has the authority of the judgment of the Supreme Court of Canada, in *Hastings Mutual Fire Ins. Co. v. Shannon*, 2 S. C. R. 394, to support it, in so far as it relates to the responsibility of the company for the act of the agent.

The findings of the jury that the plaintiff had no knowledge of the insurance effected by his mortgagees cannot, I think, be interfered with; and therefore the plaintiff is entitled to hold the judgment in his favor except in so far as the provision contained in the 4th of the variations of the conditions will require the amount of the judgment to be limited to two-thirds of the actual value of the property insured at the time of the fire.

If it were necessary to express an opinion on the point, I am not prepared to accept the view that it would not be competent for an insurance company in the body of its policy to limit the undertaking to pay two-thirds of the actual value of the loss only. That would be a different thing from fixing or adding a condition to modify the force and effect of the contract. What the defendants desired to effect by the provision in the body of the policy is accom-

plished by No. 4 of the variations of the statutory conditions, if this condition is not unreasonable. As far as it relates to the limitation of liability to two-thirds of the actual loss sustained by the assured, it appears to me it is not unreasonable, but is a statutory provision to remove from the way of a dishonest man the temptation to destroy his property, and possibly thereby endanger that of other persons to get the insurance money. But to further limit the liability to two-thirds proportionately with an insurance effected by a stranger, and whether with or without the knowledge of the insured, is certainly not reasonable.

I therefore agree in the opinion that the amount the plaintiff is entitled to recover is \$702.16, that is to say, the full sum insured on the barn and stables, \$100, which is far less than two-thirds of the value of the barn, and \$602.16 on the contents of the barn, being two-thirds of \$903.25, found by the jury to have been the value of such contents. The plaintiff is also entitled to interest on the above sum of \$702.16 from one month after the proofs of loss were delivered.

*Judgment accordingly.*

---



## [COMMON PLEAS DIVISION.]

## REGINA V. SPROULE.

*Canada Temperance Act, 1878—Defendant deprived of right of making full defence—Interest of magistrate—Calling magistrate as witness—Names of magistrates in summons.*

On a prosecution under the Canada Temperance Act for selling liquor the information on its face purported to be laid before D. and A., two Justices of the Peace, and both signed the summons. The summons to the defendant was to appear before two Justices of the Peace for the county as may be there to answer the information &c. The hearing was before D. and A. It was claimed that C. and M. were members of an association for the enforcement of the Act, and that they were instrumental in laying the charge and in selecting the magistrates; and that A. was also a member of the association and had been present at a meeting thereof. At the hearing S., the license inspector who had laid the information gave evidence in support of the charge. On cross-examination he was asked whether the license commissioners were consulted before laying the charge, whether he laid it of his own accord or had consulted with any person outside of the commissioners; his reason for suspecting and believing that liquor was sold &c.? Whom did he see before laying the information? Did he see A., C., or M.? Had C. and M. anything to do with the selection of the magistrates &c.? The magistrates ruled that he was not bound to answer the questions, and he refused to do so. For the defence, with alleged view of shewing the interest of A., he was called as a witness, but he refused to be sworn and give evidence. The defendant was convicted.

*Held*, that the Justices properly refused to allow the disclosure of the source of information on which the complaint was founded, but by their refusal to allow the cross-examination of S. in reference to his communication with A. and the other alleged members of the association, and in refusing to allow A. to be sworn as a witness, the defendant was deprived of the right of making a full defence as authorized by sec. 30 of 32 & 33 Vic. ch. 31 (D.); and the conviction therefore could not be maintained, and must be quashed.

The calling of a magistrate, sitting on a case as a witness, does not of itself disqualify him from further acting in the case.

The omission of the names of the justices from the summons was held to be no objection as the complaint was tried before the justices before whom the information was laid.

*Regina v. Ramsay*, 11 O. R. 210, distinguished.

THE defendant was on the 20th day of October, 1886, convicted before Henry S. Davy and Isaac F. Aylesworth for unlawfully selling, contrary to the provisions of the Canada Temperance Act, 1878, intoxicating liquors, between the 20th day of August, 1886, and the 9th day of October, 1886, on the complaint of George B. Sills.

The conviction, information, depositions, and proceedings were returned into this Division of the High Court of Jus-

tice under a writ of certiorari, issued on the 13th day of November, 1886. Upon the said return the defendant obtained an order nisi on the 26th day of November before Armour, J., sitting alone, calling on the said Henry S. Davy, Isaac F. Aylesworth, and George B. Sills to shew cause why the said conviction should not be quashed on several grounds, which, briefly stated, were as follows :

1. The defendant at the hearing of the complaint was not admitted to make full answer and defence and have the witnesses examined and cross-examined, inasmuch as the justices refused to require the witnesses called by the prosecution to make answer to proper and material questions put in cross-examination by defendant's counsel, and did not hear the witnesses and evidence of the defendant, and refused to require a necessary and material witness for the defendant to be sworn though present in Court.

2. One of the justices was disqualified from sitting to hear and adjudicate upon the case as he was a member of an association formed for the purpose, among others, for promoting and directing the prosecutions for offences against the Act, and defraying the expenses of such prosecutions.

3. The two justices of the peace had no jurisdiction to hear or determine the charge or make the conviction, the information having been taken and sworn to before one justice only.

4. The said two justices had no jurisdiction, as the defendant was not summoned to appear before them or any two named justices, but before any two justices.

The information on its face purported to be laid before the said two justices. Both signed the jurat.

The summons addressed to the defendant, after reciting the information laid before the said justices, proceeded : "These are therefore to command you in Her Majesty's name, to be and appear on Friday, October the 15th, A.D. 1886, at two o'clock in the afternoon, at the Town Hall, Odessa, before two justices of the peace for the said county of Lennox and Addington as may be there, to answer to

the said information, and be further dealt with according to law.

Given under our hands and seals of office at the township of Earnesttown in the said county of Lennox and Addington, this ninth day of October, A.D. 1886.

H. S. DAVY, J.P. [L.S.]

ISAAC F. AYLESWORTH, J.P. [L.S.]”

Upon the hearing before the said justices, the informant George B. Sills was examined. He swore he was License Inspector, and the defendant had no license since the first day of May last.

On cross-examination he was asked whether the License Commissioners were consulted before he laid the information? Whether he laid the information of his own accord? Whether he consulted any person outside of the commissioners before laying the charge? What reason he had to suspect and believe that defendant did between the 20th August and 9th October, sell spirituous and intoxicating liquors? Whom did he see in Odessa before laying the information? Did he see Mr. I. F. Aylesworth before he laid the information? Did he see Mr. Samuel D. Clarke before he laid the information? Did he see Dr. Meacham before? In consequence of anything that took place between S. D. Clarke were these proceedings instituted? Did S. D. Clarke and Dr. Meacham have anything to do in selecting the magistrates to try the case or before the information was laid? Had any member or any committee of the association, known as the Canada Temperance Association of Lennox, anything to do with the selection of the magistrates in this case or before the information was laid in this case? All these questions the magistrates ruled the witness was not bound to answer.

There was evidence given of liquor of an intoxicating character got at the defendant's, and paid for between the dates specified, sufficient to justify the justices in finding the defendant guilty, if they believed it.

At the opening of the prosecution, after the information was read, counsel for the defendant made the following

objections, as noted by the magistrates: (1) The information within itself is insufficient, (2) Some or one of the magistrates, before whom the information was taken, is disqualified to receive the information or to sit upon the case, (3) The summons issued upon the information is not sufficient to give the magistrates jurisdiction.

These objections were overruled, and evidence was taken as above stated.

At the close of the evidence in support of the complaint the defendant was called on for his defence.

Mr. Madden, his counsel, called as his first witness Mr. I. F. Aylesworth, one of the sitting justices. He refused to be sworn as he had not been subpoenaed. The defendant then made an affidavit asking for a subpoena to this witness. H. S. Davy, one of the justices, granted it. It was handed to a constable, who served it, and paid the witness his fee as a witness. Mr. Aylesworth was then called, and answered to his name. Counsel asked that he be sworn. He declined to be sworn as he was one of the acting magistrates. The counsel for the defence then applied for a warrant against Mr. Aylesworth. This was refused by the Court; and, no other evidence being offered, the defendant was adjudged guilty of the offence, and fined \$50, and he was ordered to pay to George B. Sills \$7.80 costs.

James Henry Madden, counsel for the defendant, made an affidavit setting forth that upon the charge being read he refused to plead, and objected to the jurisdiction of the said justices to entertain or try the said charge, because no information in fact had been laid, and there was no sufficient information, and neither the information nor the summons disclosed the names of the justices by whom the said charge would be tried; and that the justices, or one of them, were disqualified from receiving the information or sitting upon the case; and he further objected to said justices proceeding or entering upon the case: that he produced to the said justices the decision of *Regina v. Ramsay*, 11 O. R., 210, and pointed out to them the application of that case to the present; but said justices overruled the



objections, and proceeded with the charge; and the defendant again refused to plead, and informed the said justices that the defendant objected to everything from the beginning to the end, and desired it to be understood that he continued to object to the whole proceedings throughout.

He further set forth in his affidavit particulars of a conversation he had had with I. F. Aylesworth with reference to the manner in which the information was laid, from which it appeared that only one justice was present; and as to the attempt made to have the said Aylesworth sworn as a witness in the prosecution.

The affidavit further set out the proceedings at a meeting of the Scott Act Association for the Electoral District of Lennox, at which the said I. F. Aylesworth was present and took part therein, and at which it was alleged the said magistrates were selected as justices to try the case, and at which meeting the said S. D. Clarke and Dr. Meacham took an active part, and that on the hearing of the prosecution he had intended by the evidence of the said I. F. Aylesworth to prove these matters.

The said I. F. Aylesworth, by his affidavit, denied the particulars of the alleged conversation, and also alleged that the information was properly laid before the said Henry S. Davy and himself. He also denied that he was a member of the Scott Act Association. There were other affidavits in corroboration that no Scott Act Association existed.

In reply to these, Mr. Madden adhered to his statements; and in reference to the allegation that no Scott Act Association existed, he set out the evidence of Dr. Meacham in another prosecution, in which the latter stated that he was secretary of the association referred to, and had paid money towards the expenses of witnesses, in consequence of which the prosecution alluded to was dropped.

On the return of the order *nisi*, before O'Connor, J., on 7th January, 1887, the same was, by consent of counsel, transferred to the Divisional Court.

During Hilary Sittings, February 22, 1887, *Aylesworth* supported the order, and referred to *Bacon's Abridg.*, 7th ed., vol. iii., p. 206; *Regina v. Tooke*, 32 W. R. 753; *Re Holland*, 37 U. C. R. 214; *Regina v. Washington*, 46 U.C.R. 221; *Roscoe's N. P.*, 15th ed., 155; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Regina v. Ramsay*, 11 O. R. 210; *Regina v. Allan*, 4 B. & S. 915; *Regina v. Milledge*, 4 Q. B. D. 332; *Regina v. Gibson*, 6 Q. B. D. 168; *Caudle v. Seymour*, 1 Q. B. 889; *Regina v. Lee*, 9 Q. B. D. 394.

*E. F. B. Johnston* and *Delamere* contra referred to *Regina v. Handsley*, 8 Q. B. D. 383; *Regina v. Rand*, L. R. 1 Q. B. 230; *Regina v. Klemp*, 10 O. R. 143; *Read v. Perrett*, 1 Ex D. 349.

March 12, 1887. CAMERON, C. J.—The first objection taken in the order *nisi* to the validity of the conviction, that the defendant was not allowed to make full answer and defence, presents, on the material before the Court, a question difficult of solution. *Primâ facie*, every one charged with a criminal or *quasi* criminal offence, should have full opportunity to answer and repel the charge. He cannot have this opportunity if not allowed the utmost latitude in cross-examination. But then it is equally clear that those who cause criminal charges to be instituted are not bound to disclose the sources of their information. The offence charged has to be proved, and the person who makes an unfounded criminal charge may have to suffer in damages to compensate the person injured in an action for malicious prosecution. In the civil action, if he should decline to disclose the source of his information, his refusal might be accepted by the jury as evidence of malice. But in the criminal case, giving the source of information, would not tend to prove or disprove the charge. The justices in the present case were therefore quite justified, and within the requirements of the law, in ruling that the witness, Sills, was not bound to disclose the names of the persons from whom he derived the information on which he founded his complaint.

But there is a second principle of law as well and clearly established as the rule I have just referred to, and that is, with the solitary exception where a magistrate acts upon his own view of an offence, he should not be a promoter of the prosecution, or be interested personally in the matter he is called on magisterially to investigate. It is contrary to natural justice that the Judge should be interested in securing the conviction of the accused, or be influenced by any bias other than that produced by the evidence on the mind of one unprejudiced by any kind of interest to have his judgment so warped as to prevent his giving an impartial decision. If such an interest exists, the magistrate is disqualified from acting judicially, be the interest never so small. The Court cannot weigh the interest or estimate its force.

The principle is very clearly enunciated in the case of the *Regina v. Allan*, 4 B. & S. 915, which was a prosecution under the Imperial Salmon Fisheries Act, 24 & 25 Vic., ch. 109, sec. 20. The information was laid by a watcher appointed by an association formed to enforce the provisions of the Act. The convicting justices were members of the association, and one of them had been present at a meeting of the association which authorized the proceedings to be taken against the defendant. The conviction was held bad, on the ground of interest in the justices.

Chief Justice Cockburn said, at p. 922: "It is impossible to hold consistently with the principles which have been established by decided cases, and are founded in the very essence of justice, that these magistrates were competent judges upon the occasion in question. An information was laid against the defendant for violation of the provisions of an Act of Parliament passed for the protection of salmon fisheries, and the prosecutors were an association, including riparian proprietors on the banks of the Tees, interested in the protection of the salmon fishery of the river. Certain members of that association were present as justices, and took part in this conviction; they were essentially prosecutors, being members of an association the-

aggregate of which were undoubtedly the prosecutors. It is impossible to say that persons who are parties to a criminal proceeding as prosecutors can act as justices, with jurisdiction to commit summarily on the hearing of that proceeding."

The present Lord Blackburn said, at p. 924: "Upon the merits, that is, whether the conviction should be quashed, if the application for a *certiorari* was made in proper time, I entertain no doubt. One of the justices, who joined in convicting, being a member of the committee of the association which instituted the proceedings, was one of the prosecutors. There may be difficulty in finding magistrates in the neighborhood, who are not interested, to hear such an information, but members of the association which institutes the prosecution must not act as Judges upon it."

And Mr. Justice Mellor said, at p. 926: "It is highly desirable that in proceedings under such a statute as this, justice should be administered by persons who cannot be suspected of improper motives. Here one of the convicting justices was not only a member of the association, but was present at a meeting which authorized the present proceedings to be taken: it would be very mischievous if justices so circumstanced could sit upon the enquiry."

Assuming, then, that Isaac F. Aylesworth was a member of the so-called Scott Act Association, one of the objects of which was the prosecution of offenders against the Canada Temperance Act 1878, he would, under the authority of this case, and a number of other cases, have been wholly disqualified from sitting as a Justice of the Peace to hear and determine upon the question of the guilt or innocence of the defendant. That he was a member of such association, and that such an association existed at all, has been unequivocally denied by the affidavits filed in answer to the application; and so it has been argued and argued with great force that there is no foundation for the disqualification. But the disqualification was a fact that the defendant claimed he had a right to have had established at the hearing, and that all questions having a tendency to



prove that fact were proper questions to have been put to and answered by the complainant, Sills; and the questions put to him by the defendant's counsel, "Did you see Mr. I. F. Aylesworth before you laid the information? Did you see Mr. Samuel D. Clarke before you laid the information? Did you see Dr. Meacham before?" were all pertinent and relative to the status or question of disqualification of the tribunal to try the defendant; and, in my opinion, should have been answered.

The question of jurisdiction was distinctly raised. And, if these questions could have been properly put, it was competent for the defendant to establish the disqualification, and therefore want of jurisdiction of the Magistrate, by affirmative evidence; and he had a right to call and examine either or both of the justices. When, therefore, Mr. Aylesworth refused to be sworn, and the associate magistrate to use his authority to require him to be sworn, the defendant was denied the right of making full defence which the law gave him.

This right is expressly given to him by sec. 30 of ch. 31 of 32-33 Vic. (D.), which declares the party against whom the complaint is made, or information laid, shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf. The interest of a magistrate in the charge is a matter that it might be impossible for the defendant to prove otherwise than by the magistrate himself; and to deny him the right to call the magistrate as a witness is to subject him to trial by a partial and, in contemplation of law, corrupt tribunal, and deprive him of the opportunity of manifesting that which would make its judgment abortive and of no effect.

I have not been able to find a case presenting the same features as the present; but I think it comes within the principle of the decision in *Re Holland*, 37 U. C. R. 214. It was there held that where the magistrates, under the Public Health Act, 36 Vic. ch. 43, (O.), refused to hear witnesses for the defence, on the ground that the Act made

no provision for calling such witnesses, the magistrates could be compelled by *mandamus* to re-open the complaint.

The present Chief Justice of the Queen's Bench delivered the judgment of the Court, and expressed the opinion that a *certiorari* might have issued, notwithstanding section 35 of the Act prohibited the removal of the proceedings by *certiorari*, on the ground that it was not for the purpose of review the application was made, but in order to be assured that the justices were proceeding in a manner warranted by and not contrary to law, and because the conviction is entirely without jurisdiction.

If the magistrates had not jurisdiction to convict the conviction cannot be permitted to stand, and the only way of avoiding it is, not by obtaining a *mandamus* to compel the magistrates to re-open the complaint and hear the evidence, but by an application to quash it. It may be, if the remedy of *certiorari* were taken away, and it not being made clearly manifest that the magistrates were without jurisdiction, the only way of obtaining relief would be by *mandamus* to re-open the complaint; but if there has been a clear miscarriage of justice, and I take a refusal to examine witnesses for the defence and to permit a cross-examination of the witnesses for the prosecution, is such miscarriage, and a clear excess of jurisdiction which invalidates the conviction.

If it were necessary to determine as matter of fact that Mr. Aylesworth was disqualified, I do not think the Court could do so on the material before it, as there is no positive evidence to establish it, while the existence of the disqualifying circumstances are absolutely denied. But in a criminal proceeding, such as this is, it is not necessary to go further than to shew that the defendant has been denied the opportunity of making a full defence; and he is not bound on such an application to shew the defence he was not permitted to make would, if made, have been sufficient; that is, that his evidence would have established the sufficiency. The contradiction presented by the affidavits filed,

and especially the contradiction shewn by the evidence given by Dr. Meacham on a previous occasion in reference to the existence of a Scott Act Association and his connection therewith, and his affidavit [filed in answer to this application, demonstrates how unjust it might be to the defendant to be deprived of the right of examining the witnesses *vivâ voce*.

Mr. Johnston contended that, assuming it was established that Mr. Aylesworth was a member of the association, and that its design was the prosecution of offenders against the provisions of the Temperance Act, that alone would not be sufficient to disqualify him, without shewing that he had taken some part in directing this prosecution; and decisions to the contrary of this must be deemed to have been overruled by the more recent case of *Regina v. Handsley*, 8 Q. B. D. 383. This case does not, in my judgment, sustain this contention.

The Act under which the justices in that case acted, expressly prevented their being disqualified as members of the council from acting as justices of the peace in matters arising under the Act; and, therefore, to create in their case the disqualification of the common law, it was necessary to establish that they had such a substantial interest in the result of the hearing as to make it likely they had a real bias.

The enabling provision of the Act was as follows: "Except as expressly otherwise provided, any person shall not be disqualified or disabled to act as a justice of the peace \* \* in any matter arising under or in relation to this Act, by reason of his being a ratepayer in the borough, or liable to any payments under the Act, or a member of the council or any committee thereof."

That this provision takes the case out of the common law rule, is manifest from the language of Mr. Justice Cave, who pronounced the judgment of the Court. After considering the conflict of authority, he said, at p. 386: "Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of

opinion, in cases like the present where such a section as sec. 502 of this local Act exists, it is not enough to shew merely that an adjudicating justice is a member of the town council, and, as such, has a pecuniary interest in the result of the complaint or information, or that he is a member of the corporation which is charged with the duty of prosecuting the offence which he sits to adjudicate upon, but in order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter."

The general principle that excludes a justice from acting where he is interested pecuniarily or actively concerned in the prosecution, cannot be said to be in any manner affected by the decision in *Regina v. Handsley*.

But it has been objected that Mr. Aylesworth could not be properly called as a witness, as his being examined would disqualify him from resuming his seat as one of the adjudicating justices, and thus the Court would be dissolved. This, Mr. Aylesworth alleges, was his motive for declining to be sworn. He was wrong in forming this opinion, as it seems clear from authority his being sworn would not simply on that account have dissolved the Court.

In the passage in *Bacon's Abridgment*, 7th ed., vol. iii., p. 206, referred to by Mr. Aylesworth, the defendant's counsel, in the argument, it is said: "It seems agreed, that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the judges who is to try him; and therefore in the case of *Hacker*, Kelynge, 12, two of the persons in the commission for the trial came off from the bench, and were sworn, and gave evidence, and did not go upon the bench again during his trial." The latter statement may have led to the impression that the ceasing to act was necessary after giving evidence; but the law does not appear to be so, though where the trial can be proceeded with without the aid of the justice who is sworn as a witness, I think it would be better that the justice should not further act as one of the triers.



In the case of *North v. Champernoou*, 2 Ch. Cas. 79. referred to in a note to the above passage from *Bacon's Abr.*, p. 206. it was held that a commissioner, by virtue of a commission out of Chancery, could be examined as a witness at the commission.

It is also said in *Bacon's Abr.* at the same page: "Nor is it any exception to a witness, that he is one of the jurors; but then he is, if called upon, to give his evidence on oath openly in Court, and not to be examined privately by his companions."

The second objection taken to the conviction in the order *nisi*, presents the question of the disqualification as one of fact, and on the material before the Court it is not possible to say the objection is entitled to prevail, as the fact on which the disqualification is rested has not been established; and, had the magistrate, Isaac F. Aylesworth alleged on his *viva voce* examination what he has stated in his affidavit, and there was no other evidence than what the defendant has laid before us on affidavit, we must decide that there was no disqualification shewn. It is the denial of the right of the defendant to have had the *viva voce* testimony of Mr. Aylesworth that has created the difficulty, and the Court cannot say or know what might have been made to appear by such examination.

It may be of great importance that the provisions of the Temperance Act against offenders against the Act should be rigidly and vigilantly enforced; but that cannot be of more importance than that to every one accused of a criminal or *quasi* criminal offence, there should be accorded a fair and impartial trial by judges uninterested as members of an association organized to promote the prosecution. It is infinitely better, in the public interest, that an offender against the Act should escape punishment, than that one accused of an offence should feel that his judges were not impartial, and he could not receive a fair trial from them.

The third and fourth grounds of objection to the conviction taken by the order *nisi*, have been wholly displaced by the evidence, except in so far as the fourth objection relates to

the names of the two justices before whom the hearing was to take place not appearing in the summons.

This case differs from the case, *Regina v. Ramsay*, 11 O. R. 210, in which it was held by my learned brother Galt, that the names should appear in the summons, as it did not appear in that case that the information had been laid before both the sitting justices, while here that is established, and so the magistrates who received the complaint were the same who sat upon the trial.

The 105th section of the Canada Temperance Act, 1878, does not in terms require the names of the justices who are to hear the complaint to be stated in the summons; and the object of the provision was, I think, to prevent, as sometimes happened, justices of the peace being induced by friends of the prosecutor or counsel to interfere in the investigation when not required to do so by the justice or justices primarily seized of the case.

I do not think the omission of the names of the justices from the summons, even if the case of the *Regina v. Ramsay* was well decided, would prevent the justices before whom the information was laid from hearing the complaint, as there would in their so doing clearly be no infraction of the requirements of section 105.

I am therefore of opinion the application must succeed only on the ground of the justices refusing to allow the cross-examination of the informant, Sills, in reference to his communication with Mr. Aylesworth and the other alleged members of the association, and the refusal of Mr. Aylesworth to be sworn as a witness.

The conviction will be quashed, and the order *nisi* made absolute without costs.

GALT and ROSE, JJ., concurred.

---

## [COMMON PLEAS DIVISION.]

## IN RE WEIR.

*Extradition—Depositions—Authentication—40 Vic. ch. 25, sec. 9 (D.)—  
Evidence, sufficiency of—Weight of—Divisional Court.*

In extradition proceedings the information, warrant and depositions were certified under the hand and seal of a justice of the peace of Oscoda township, in the county of Josio, in the state of Michigan. There was also a certificate under the hand of the clerk of the county of Josio and the clerk of the Circuit Court for the said county, and the official seal of the said Circuit Court, certifying that the said justice of the peace was, at the time of signing his certificate, a duly qualified justice of the peace, in the active discharge of the duties of his said office, and that his official seals were entitled to full credit. At the hearing before the county Judge, before whom the extradition proceedings were had, S. stated he was the prosecuting attorney for Josio county, and all criminal prosecutions therein came under his care. He identified the papers, and that they were the depositions and copies of depositions relating to the charge; and that the justices who took the depositions were justices of the peace as alleged, and had jurisdiction in the premises.

*Held*, that the documents were sufficiently authenticated.

"Authenticated," as used in sec. 9 of 40 Vic. ch. 25, (D.), is in effect the same as "attested" in sec. 2 of 31 Vic. ch. 94, (D.)

*Held*, also, that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant issued.

*Held*, also, that the depositions, &c., before the County Court Judge disclosed sufficient evidence to warrant the defendant being placed on his trial for murder caused, as was alleged, by the defendant having feloniously ravished the deceased while in such a state of health to hasten her death.

*Per CAMERON, C. J.* The Divisional Court cannot review the decision of the judicial officer having jurisdiction to hear extradition cases upon the weight of evidence.

ON the 8th day of January, 1887, David H. Weir obtained writs of *habeas corpus* and *certiorari* to cause him to be brought before a Judge in Chambers, together with the depositions, evidence, orders and proceedings had before William Elliott, Esquire, Judge of the County Court of the County of Middlesex, with a view to his discharge from the custody of the keeper of the common gaol at London, in the County of Middlesex.

The writs were returned before Galt, J., in Chambers, who, by and with the consent of counsel for the said David H. Weir, and of counsel for the Crown, enlarged the application for the discharge of the said Weir before this Court,

and directed the writs of *habeas corpus* and *certiorari*, together with the returns thereto made by the gaoler and the said County Judge, to be returned here.

From these returns it appeared that on the 3rd of December 1886, one Wesley M. Featherly made complaint upon oath, before Charles E. Marvin, a justice of the peace of the Township of Oscoda, in the County of Josio, in the State of Michigan, one of the United States of America, that David H. Weir on the 5th day of November, 1886, in the said county, feloniously, wilfully, and of his malice aforethought did kill and murder one Mabel Clark, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the people of the State of Michigan. Wherefore the said Wesley M. Featherly, prayed that the said David H. Weir might be apprehended and held to answer the complaint, and further dealt with in relation to the same as law and justice should require.

On this complaint a warrant was issued under the hand and seal of the said justice, directed to the sheriff or a constable of the said county, requiring the arrest of the said David H. Weir.

The information, warrant, and depositions, were certified under the hand and seal of the said justice. There was also a certificate under the hand of the clerk of the County of Josio and clerk of the Circuit Court for the said county, and the official seal of the said Circuit Court, that the said justice of the peace was at the time of signing his certificate a duly elected and qualified justice of the peace, in the active discharge of the duties of the said office, and that his official acts were entitled to full credit.

Among the depositions returned was a deposition made by Mabel Clark before her death, on the 4th of November, 1886, before John Worth, a justice of the peace of the said County of Josio, in which she deposed as follows: "I, Mabel Clark, do make this statement and declaration under oath: I went to the Lake Shore Hospital, kept by Dr. Weir, on Thursday the 28th day of October, A.D. 1886.



I was sick about a week or more before I went to the hospital at David Semplener's house, where I was working before I went to the hospital." She then detailed the nature of the offence charged, namely, that the defendant had forcibly ravished her and brutally used her on the 28th, 29th, and 30th days of October, 1886.

This was signed by her, and purported to have been taken before a justice of the peace as follows :

"Subscribed and sworn to before me, this 4th day of November, A.D. 1886.

"JOHN WORTH, Justice of the Peace."

On the back of this deposition there was further deposition by the said Mabel Clark, further detailing the circumstances of the alleged offence, which was also signed by her, and purported to have been taken before the same justice of the peace, as follows :

"Subscribed and sworn to before me this 4th day of November, A.D. 1886.

"JOHN WORTH, Justice of the Peace."

The depositions further disclosed that deceased died on the 5th day of December, 1886 ; and that a post mortem examination had been made on the 6th December.

There were also the depositions of medical men and others as to the cause of death.

There was also *vivâ voce* evidence given before the learned County Court Judge, in London, by medical men.

William H. Simpson was sworn, and deposed that he was prosecuting attorney for Josio County: that all criminal prosecutions for the county came under his care. Looking at certain papers handed to him by Mr. Hutchinson, he said they were depositions and copies of depositions relating to Weir. He compared the copies with the original depositions. The original depositions were written in the presence of the justices. The deposition of Mabel Clark was not taken in his presence, but he compared the copy with the original, and it is a true copy. Witness further swore : " I know John Worth a justice of the peace, and I know him

to be a justice of the peace now, and also at the time the deposition was taken. I have seen him act as such and have practised before him as such. Charles E. Marvin, is well known to me. He is a justice of the peace for the township of Oscoda in the county of Josio, in the State of Michigan, and had jurisdiction where this matter relating to Weir occurred; and Mr. Worth had likewise jurisdiction at the township of Aux Sable to take the deposition of Mabel Clark, as a justice of the peace." He identified all the depositions as having been taken before the said Charles E. Marvin, except the deposition of Mabel Clark, the deceased, which was taken before the said John Worth, and the complaint of Wesley M. Featherly; all of which were filed and a warrant thereon issued by the said Charles E. Marvin; and he verified the warrant and a true copy of it.

The learned County Court Judge gave a clear and carefully prepared written judgment, setting forth his reasons for coming to the conclusion that a *prima facie* case for the commitment of the prisoner for extradition had been established.

He found that the evidence established (1) that the accused was a practising physician in Michigan, and kept a sort of hospital for the sick; (2) That the deceased Mabel Clark was received into the hospital on the 28th October, 1886, with symptoms of malarial fever; (3) That while in this hospital she was under the control of the accused; (4) That he forced her person on three occasions while in the hospital; (5) That when he did so she was in a condition of health which would render sexual intercourse dangerous even with consent, but much more so if accomplished by force, as this is said to have been; (6) That eight days after her entrance into the hospital she died; (7) That her death, if not caused, was accelerated by the acts of the accused in thus forcing the person of the deceased.

In Hilary Sittings, 1887, *Aylesworth* supported the motion, and referred to the *Webster, Worcester, Imperial* and

*Bouvier*, Dictionaries, *tit.* Authentication; *Regina v. Barrow*, L. R. 1 C. C. 156; *Regina v. Fletcher*, L. R. 1 C. C. 39; *Regina v. Greenwood*, 7 Cox C. C. 404; *Regina v. Jenkins*, L. R. 1 C. C. 189; *Regina v. Browne*, 6 A. R. 386.

*Hutchinson* (of London), *contra*, referred to *Regina v. Browne*, 31 C. P. 484, 496; *Roscoe Cr. Ev.*, 9th ed., 746, 750-2; *Stephen's Dig. of Criminal Law*, 3rd ed., Art. 219; *Regina v. Fletcher*, cited in 1 *Russell on Crimes*, 4th ed., 703.

March 12, 1887. CAMERON, C. J.—All the findings or conclusions of the learned County Court Judge are sustained by the evidence before him, if the depositions taken in the State of Michigan, and particularly the deposition of the deceased, taken on the 4th of November before John Worth as a Justice of the Peace, are admissible in evidence.

Mr. Aylesworth, in his argument, contended that the depositions were not so authenticated as to render any of them admissible in evidence; and particularly the deposition of the deceased was open to objection, having been made in respect of a different charge from homicide, was not in the nature of an information, and no charge was then depending in respect to which it could apply as a deposition; and it did not appear to have been taken as a dying declaration, and was not admissible as such declaration, as it was not shewn affirmatively that at the time it was made the deceased was then without hope of life.

Mr. Aylesworth pointed out that the learned County Court Judge was assuming to act under the authority of the Act, 31 Vic. ch. 94, (D.), whereas the Act in force at the time was the 40 Vic. ch. 25, (D.), which he contended differed as to the manner of authenticating the proceedings.

By sec. 2 of the former Act, at the hearing of a complaint “upon the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them, to be true copies of

the original depositions, may be received in evidence of the criminality of the person so apprehended;" which, with the addition of the production of the original depositions, was the method adopted in the present case. Whereas by sec. 9 of the latter Act it is provided that "Depositions or statements taken in a foreign state on oath, or on affirmation, where affirmation is allowed by the law of the state, and copies of such depositions or statements, and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence on proceedings under the Act. (2) Such papers shall be deemed duly authenticated, if authenticated in the manner provided for the time being by law, or if authenticated as follows,—(a) If the warrant purports to be certified by, or the certificate purports to be certified by, or the depositions or statements or the copies thereof purport to be certified to be the original or true copies by a judge, magistrate, or officer of the foreign state. (b) And if in every case the papers are authenticated by the oath or affirmation of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of the foreign state; of which seal the Judge shall take official notice without proof."

As I understand Mr. Aylesworth's argument it was that these provisions required something more than was required before, and that the status of the justice of the peace required authentication under the official seal of the Minister of Justice or other minister of the foreign state.

I am of opinion there is no warrant for this argument; and the provisions extend rather than restrict the manner of authentication; and the word "authenticated," as used in the ninth section of the later Act, is in effect the same as "attested" in section two of the earlier Act; and, as far as authentication is required, it has been done in the present case. The depositions have been certified under the hand and seal of the justices respectively before whom taken, and have been sworn to be correct and true copies by the prosecuting attorney producing them



But Mr. Aylesworth urged, assuming that there is a sufficient authentication of the depositions, that they do not make out a case for the committal for trial of the accused for the offence of murder, if the alleged offence had been committed in Canada: that there is no evidence of any act committed by the accused that in its natural result was likely to have caused the death of the deceased, and from which malice could be inferred; the deposition of the deceased, wherein it is alleged that the accused ravished her, not having been made in respect of the alleged homicide, or any charge relating thereto, cannot be looked at and is wholly inadmissible for that reason; and, in the absence of that so called deposition, there is no evidence whatever against the accused except his admission that he had sexual intercourse with the deceased which was, he alleged at the time of the admission, a treatment calculated to benefit the deceased who was suffering from defective menstruation.

On the argument it struck me there was considerable force in the objection that depositions admissible in evidence could only be those made in respect of the charge upon which the original warrant was issued. But the wide language used in sec. 9 of 40 Vic. ch. 25, which permits depositions and statements taken on oath in the foreign country to be used without restricting the admissibility of such statements and depositions to those taken on the particular charge, has, upon further consideration, convinced me it is not entitled to prevail.

The question was considered in *Re Counhaye*, L.R. 8 Q.B. 410, under sec. 14 of the Imperial Extradition Act, 33 & 34 Vic. ch. 52, which is as follows: "Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of a conviction, may, if duly authenticated, be received in evidence in proceedings under this Act."

Lord Blackburn in delivering judgment said, at p. 416: "We are, I believe, also all agreed that sec. 14 makes depo-

sitions, properly authenticated, evidence in proceedings under the Act, whether they are taken in the particular charge or not. \* \* In most European States, I believe, it is not the practice to take the depositions in the presence of the accused ; at all events, the law is indifferent in the matter. I would add that it is for the magistrate to give what weight he thinks proper to depositions so taken."

It remains to be considered whether the depositions disclose evidence sufficient to warrant the accused being placed upon his trial for murder. If there is legal evidence tending to attach criminality to the accused, the County Court Judge is the functionary who in the present instance is to determine the weight to be attached to the evidence. Though a Judge of the High Court of Justice may as a Judge of first instance hear a charge preferred against a fugitive from justice from a foreign country, he is not at liberty, I think, to review the decision of any other judicial officer having jurisdiction to hear extradition cases upon the weight of evidence merely; and the Court's supervision does not extend beyond the right of revision, where the case does not come within the class of extraditable offences, or there is no evidence of criminality at all to warrant a committal for extradition.

Assuming then that the deposition of the deceased shewed that the accused had feloniously ravished her, and there is evidence that such ravishment hastened her death, there is evidence to warrant his committal for trial for murder, as the felonious ravishment supplies the place of proof of malice aforethought, and death on its acceleration is traced to the felonious act of the accused.

In principle the case is not distinguishable from *Re Brown*, 6 A. R. 386, 392, cited on the argument, and referred to by the learned County Court Judge in his judgment.

I think probably there would also be a *prima facie* case made out against the accused by reason of his admission of having had sexual intercourse with the deceased, though by consent and without force, when the condition of her

health was such that he, as a medical man, must have known, if the opinion of the medical men who so deposed is correct, that such connection would be dangerous to her life, and there was a recklessness in his conduct that would supply the place of malice.

I do not wish to be understood as expressing any opinion upon the guilt or innocence of the accused ; but simply to state my concurrence in the judgment of the learned County Court Judge that a case has been made out that warrants his apprehension and committal for extradition ; and therefore he must be remanded to the custody of the keeper of the common gaol at London to be detained in accordance with the warrant of the learned County Court Judge.

I express no opinion as to the admissibility of the statement under oath of the deceased as a dying declaration.

ROSE, J.—While agreeing that the prisoner must be remanded, I desire to leave open for further consideration the question, should it arise, as to how far the Court is at liberty to review the finding of the Judge of first instance as to the sufficiency of the evidence.

In my opinion there is in this case sufficient evidence, and I express no opinion on the right of review.

On all other grounds I fully concur in the judgment of the learned Chief Justice.

GALT, J., concurred.

---

## [COMMON PLEAS DIVISION.]

## McLay v. The Corporation of the County of Bruce.

*Defamation—Libel—Cause of action—Sufficiency of—Municipal corporations, liability for.*

The statement of claim alleged that from 1874 to 1883 the plaintiff was registrar of deeds of the county of Bruce: that in 1880 on a petition of the defendants to the Lieutenant-Governor, a commissioner was appointed to enquire into the conduct of the plaintiff as registrar, and an enquiry held, when charges of a defamatory character were made against the plaintiff, setting them out: that the charges were not sustained in law or by the evidence, and were shewn to be, and were, untrue in fact, and to have been made maliciously and with the design of injuring the plaintiff: that before the commissioner had made any report on the charges the defendants maliciously, and without any reasonable or probable cause, and with design and intention of injuring the plaintiff in his reputation, character and business, caused the accusations, charges, and defamatory statements thereinbefore specially mentioned, and portions of the evidence adduced before the said commissioners, together with certain statements made by one R., who, during the investigation, acted as defendants' solicitor, to be printed and published in pamphlets and in the minutes of the County Council, and circulated throughout the county and elsewhere in the Province, greatly to the prejudice, detriment, damage, and injury of the plaintiff. *Held*, on demurrer, that a good cause of action for libel was shewn, and that such action lies against a municipal corporation.

## DEMURRER.

The statement of claim was as follows:

1. The plaintiff was Registrar of Deeds for the county of Bruce from February, 1864, until December, 1882.
2. In 1880, the defendants petitioned the Lieutenant-Governor of the Province, for the appointment of a commission, to enquire into the conduct of the plaintiff as Registrar as aforesaid.
3. In compliance with the petition, Æmelius Irving, Q. C., was appointed commissioner to enquire into the conduct of the plaintiff as registrar.
4. The commissioner held the enquiry at intervals, from the 9th of December, 1881, till the 4th of January, 1882.
5. On the opening of the investigation, the following charges were made by the defendants against the plaintiff.
6. (1.) That he defrauded the county out of large sums of public money.



(2.) That he made default in making the statutory return of fees for the purpose of concealing such funds.

(3.) That he made false returns under oath for the same purpose.

(4.) That for the purpose of delaying and embarrassing the trial of an action for the said frauds, he made, procured and used false affidavits.

(5.) That he made numerous false statements on oath and otherwise, in reference to the claim of the county against him; and improperly used the process of the Court to intimidate persons from making known the facts.

(6.) That he has been for a long time, and is now, exacting excessive fees in his office to a large amount.

(7.) That he has been virtually convicted of the crime of libel.

During the progress of the investigation, the defendants made the following additional charges against the plaintiff:

(8.) That he, during the years 1870 to 1872, received moneys as fees of office, which were not entered in the books kept in the registry office under the statute, and afterwards made oath to the correctness of his receipt of fees as shewn by such books.

(9.) That on the 25th of January, 1872, he made a false statement of the disbursements of his office in an official communication to the Provincial Secretary, which was intended by him, and was actually used in the House of Assembly to deceive the House in regard to a matter of legislation under discussion at that time.

(10.) That through intoxication he left the registry office, and the public records therein open and exposed over night, and over Sunday, on several occasions.

(11.) That he practised conveyancing and money lending on the security of mortgages of real estate in the county in his office of registrar.

(12.) That he falsely represented to the Government, that he possessed the confidence of the community in which he lives and many positions of trust, whereas he had no such position except the office of registrar, and could not obtain

any on account of his scandalous life, and is seen very frequently on the public streets in a state of intoxication from drink.

7. During the investigation, evidence was adduced in support of and against the said charges, and the same were not sustained in law or by the evidence, and were shown to be, and were, untrue in fact; and it was also shown they were made maliciously, and with the design of injuring the plaintiff.

8. Before the commissioner had made any report on the charges, the defendants maliciously, and without reasonable and probable cause, and with the design and intention of injuring the plaintiff in his reputation, character, and business, caused the accusations, charges, and defamatory statements hereinbefore specifically enumerated, and portions of the evidence adduced before the said commissioner, together with certain statements not under oath, and, among them, statements made by one D. W. Ross, (who, during the said investigation, acted as the solicitor for the defendants,) to be printed and published in pamphlets, and in the minutes of the council of the said county, and circulated throughout the county, and elsewhere in the Province, greatly to the prejudice, detriment, damage, and injury of the plaintiff.

9. By reason of the said unlawful, unjustifiable, and malicious conduct of the defendants, the plaintiff suffered and has sustained great trouble, expense, loss, and damage, in defending himself from the said charges before the said commissioner, and against suits and prosecutions brought against him in consequence of the publication and circulation of the said charges, and also the loss of the office of registrar of the said county with the fees and emoluments thereto belonging; and also suffered other loss, pecuniary and otherwise, in his business, character, and reputation by reason of the unlawful acts of the defendants heretofore complained of. And he claimed \$40,000 damages.

The statement of defence alleged that the commissioner reported that the charges were proved; and that afterwards

the Lieutenant-Governor in Council, on reading the said report of the commissioner, cancelled the commission of the plaintiff as registrar of said county of Bruce, and dismissed him from his office of registrar.

The defendants demurred to the whole of the statement of claim, on the ground that the facts alleged therein did not show any cause of action.

The following were some of the matters of law intended to be argued on the argument of the demurrer.

1. That the defendants, being a corporation, cannot be guilty of malice.

2. That a municipal corporation is not responsible in damages for malice.

3. That the defendants, being a municipal corporation only, are not liable to be sued for damages for libel.

The case was argued before Wilson, C. J., in Single Court.

*Osler*, Q. C., and *Shaw*, Q. C., (Walkerton,) for the defendants. They contended that no action grounded on malice was sustainable against a corporation; but not, at any rate, against a municipal corporation which was created for purposes in no way connected with matters relating to publications of the kind complained of. If the defendants were a printing and publishing company they might [for the present argument be admitted to,] be liable for the publication of a libel, because the business of printing and publishing was the trade and business they were incorporated to carry on; but that was not the case of the defendants. In *Abrath v. North Eastern R. W. Co.*, 11 App., Cas. 247, which was an action for malicious prosecution, Lord Bramwell was of opinion the action would not lie against a corporation aggregate, because it was a body incapable of malice or motive. They referred also to *Dillon* on Municipal Corporations, 3rd ed., secs. 961, 966; *Green v. London General Omnibus Co.*, 29 L. J. C. P. 13, 6 Jur. N. S. 228; *Whitfield v. South Eastern R. W. Co.*, E. B. & E. 115; *Gwynne v. South Eastern R. W. Co.*, 18 L. T. N. S. 738; *Henderson v. Midland R. W. Co.*, 24 L. T. N. S. 881; *Mc-*

*Sorley v. Mayor, &c., of St. John*, 6 S. C. R. 531; *Oliver v. City of Worcester*, 102 Mass. 489, 499; *Molsons Bank v. Corporation of Brockville*, 31 C. P. 174.

*Meek, contra.* A corporation may be rendered liable in an action for malicious prosecution; *a fortiori* a corporation is liable for a libel, published by its authority. In this respect there is no distinction between a municipal corporation and any other. He referred to the following cases: *Philadelphia, &c., R. W. Co. v. Quigley*, 21 Howard 202; *Tench v. Great Western R. W. Co.*, 32 U. C. R. 452; reversed on appeal, 33 U. C. R. 8; *Brice on Ultra Vires*, 2nd ed., p. 451, 452, 476; *Southampton, &c., Bridge Co. v. Local Board of Southampton*, 8 E. & B. 801; *Brownlow v. Metropolitan Board of Works*, 16 C. B. N. S. 546; *City of Montreal v. Hall*, Cassels Dig. of Supreme Court Decisions, 280; *Folkard on Libel and Slander*, 4th ed., 290, 592. He handed in also a list of cases referred to in *Odgers on Libel and Slander*, p. 368; and he further referred to *Ex. p. Ellison*, referred to in *Regina v. Carden*, 5 Q. B. D. 1, 13. As to demurring to pleading, *Leyman v. Latimer*, 3 Ex. D. 15, 352; *MacLennan's Jud. Acts*, 2nd ed., 382; *Chamberlain v. Boyd*, 11 Q. B. D. 407, at p. 413; *Wilcocks v. Howell*, 5 Q. B. 360; *Blagden v. Bennett*, 9 O. R. 593.

*Osler*, in reply, referred to *Dillon on Municipal Corporation*, sec. 967.

WILSON, C. J.—It was disputed what the action was brought for. The defendant's counsel understood the complaint was for the publication of a libel in preferring the charges against the plaintiff to the Lieutenant-Governor, and before the commissioner who was appointed to make the investigation; and also for the publication of the pamphlets and the minutes of the defendants' council.

The plaintiff's counsel contended the complaint, so far as the first seven paragraphs, was for the malicious prosecution of the plaintiff before the commissioner; and the residue of the statement of claim was for libelling the plaintiff by the publication of the pamphlets and the minutes of the defendants' council.



Before considering the case upon the demurrer, it is necessary to determine what it is the statement of claim complains of.

To the end of the sixth paragraph, the statement of claim is a mere narrative of the proceedings antecedent to and down to the time of holding the investigation, which was directed to be made into the charges which were preferred by the defendants against the plaintiff.

The seventh paragraph then alleges that evidence was adduced in favour of and against the charges: that the charges were not sustained in law or by the evidence; and they were untrue in fact, and were maliciously made with the design of injuring the plaintiff.

If this be a charge for libelling the plaintiff under the cloak of an official investigation, the statement of claim so far alleges all the elements which entitle the plaintiff to maintain such an action.

It shews the charges were *false*, which must be shown in all actions for defamation; and it shews, as it must, when privilege appears, that they were *maliciously* made for the purpose of injuring the plaintiff.

If the statement of claim so far be, as the plaintiff says it is, a charge against the defendants for the malicious prosecution of the plaintiff, the question is, has the plaintiff set out such a cause of action? To support such a case it must appear the defendants acted "maliciously and without reasonable and probable cause," and the burden of that proof rests upon the plaintiff; and the plaintiff must also shew the proceedings have ended favourably for him.

The allegation of malice is made; but is it shown that the proceedings are terminated? or that they terminated favourably for the plaintiff?

There is no such allegation in the seventh paragraph, nor in the ninth paragraph, unless it can be said that the statement, "By reason of the unlawful \* \* conduct of the defendants the plaintiff has suffered \* \* the loss of his office of registrar, &c." It does not properly show a termination of the proceedings; but, if it do, it shows they terminated unfavourably for the plaintiff.

In an action charging a malicious arrest for debt when no debt was due, or for an offence when no offence had been committed, the termination of the action finding no debt was due, or of the prosecution finding no offence had been committed, is an essential part of the plaintiff's ground of action ; but, if the action be brought not in respect of the debt, but because the debtor was not about to abscond, and the Judge's order for the arrest has been set aside, the action for the malicious arrest may go on before the termination of the proceedings for the recovery of the debt, because the action for the arrest has nothing to do with the subject of the action for the debt.

In the present case it is different. The charges made to the Lieutenant-Governor and before the commissioner are said by the plaintiff to be false, malicious, and defamatory; but how can he say that, pending the enquiry into their truth, and before any finding has been made upon them?

The defendants, however, by their pleading have expressly shown the termination of the investigation, for that the commissioner reported upon the charges to the Lieutenant-Governor, adversely to the plaintiff, and the Lieutenant-Governor adopted and acted upon the report, by dismissing the plaintiff from his office of registrar.

The defendants have also demurred to the statement of claim, but that cannot avoid the effect of curing the defects in it, so far as they are curable by amendment, and by completing by all necessary averments the deficiencies of the pleading.

So far, then, the statement of claim may be sustained as an action for the publication of a libel upon, but not as a malicious prosecution, of the plaintiff, from the want of the averment that the defendants acted without any reasonable or probable cause.

I may say also, I am strengthened in the opinion that the plaintiff has unconsciously stated a good cause of action for a libel while seeking to describe his wrongs in the form of a malicious prosecution, because in the eighth paragraph, he describes the accusations and charges as *defamatory* statements.

The plaintiff's eighth paragraph of his statement of claim then sets out that the defendants published the said "accusations and charges hereinbefore made," in pamphlets, and in their minutes of council, which were circulated throughout the county and elsewhere with the intent of injuring the plaintiff; which is plainly a charge of libel; and, in the paragraph where it is not required, the publication is said to have been without reasonable and probable cause, and, rightly enough, maliciously, and with the design of injuring the plaintiff.

The accusations, &c., are not in the paragraph said to be *false*, otherwise than by referring to them as the accusations "hereinbefore made," that is, in the seventh paragraph where they are said to be "untrue in fact;" and that may be a sufficient allegation that they are false.

I am of opinion the whole complaint, with whatever intent it was drawn, is framed as a specific charge against the defendants for the publication of three different alleged libels of the plaintiff.

The question, on the demurrer argued before me was, whether an action for libel would lie against a corporation, more particularly against a municipal corporation. The following cases are referred to, *Williams v. Beaumont*, 10 Bing. 260. Williams, the chairman of a company, who was empowered by statute to sue for the company, brought an action for libel against the defendant Beaumont, under the general words conferring such power. The Court held an action for libel was within such words. The company was not made a corporation, and it was held that where the company could sue without the Act by naming all the members, the Act enabled the company to sue by the chairman. The libel it was said was not of the individual members, but of the company. It was argued also, at p. 267, that "the company being a fluctuating body, unincorporated, the individuals composing it at the time of judgment may be all different from those who composed it at the time of the libel and the commencement of the suit." But Tindal, C. J., said that could make no difference to the defendant;

the Act authorized the proper disposition to be made of the means of the company; and that such an objection applied equally to every kind of action that can be brought by a joint stock company.

The objection just referred to was relied upon by Mr. Osler and Mr. Shaw, the counsel for the county of Bruce, as a reason why the county could not be made liable; but that would equally be an answer if it could be maintained against a recovery being had against a municipal body for any kind of claim or contract, or for misfeasance of any kind.

In *The Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87, it was held a Joint Stock Company incorporated under the Joint Stock Company's Act could maintain an action for libel against one of the shareholders. It was argued for the defendant that the plaintiffs were only a quasi corporation, and not a full corporate body, and such a body could not sue one of the members, and could only sue in respect of matters necessarily incident to the purpose for which it was incorporated; and there was no instance of a corporation having maintained an action for libel or slander. The Court decided an action for libel was maintainable by a corporation at the common law. It was said by the Chief Baron it would be monstrous if such a body could not sue for slander of title through which it lost a great deal of money.

Martin, B., said, at p. 91: "There is no pretence for saying that in such a case the company could not sue in respect of an injury done to its trade by the libel."

Watson, B., said, at p. 93: "I cannot conceive a proposition more dangerous than this, that because a company is incorporated they have no appeal to a court of justice if they are libelled. \* \* I cannot distinguish between corporations created for certain purposes and corporations at common law."

In *Philadelphia, &c. R. W. Co. v. Quigley*, 21 Howard 202, an action for libel will lie against a corporation for the publication of a report by the president and directors to the shareholders.



*Whitfield v. South Eastern R. W. Co.*, E. B. & E. 115, an action for libel will lie against a corporation "aggregate," so held on demurrer to the declaration. There the charge was that the defendants sent along their telegraph line a libellous message, that the plaintiff's bank had stopped payment.

Lord Campbell, C. J., stated in effect, that if the act was wrongful malice might be inferred from the unlawfulness of the act; and if express malice is not necessary to be proved, the objection to the action not lying against the corporation failed; and that express malice might, in certain circumstances, be imputed to and proved against a corporation.

And it has been held in *Regina v. Great North of England R. W. Co.*, 9 Q. B. 315, that a corporation may be indicted for obstructing a highway; and in *Eastern Counties R. W. Co. v. Broom*, 6 Ex. 314, in error, that the corporation may be sued for an assault committed by their order. See the American decisions noted in the American reprint of this report.

In *Green v. London General Omnibus Co.* 29 L. J. N. S. C. P. 13, 6 Jur. N. S. 228, the plaintiff charged the defendants with driving their omnibuses wrongfully, vexatiously and maliciously, in such a manner, just before and just behind the plaintiffs' omnibuses, as to hinder and frighten great numbers of persons from entering the plaintiffs' omnibuses, &c.

Demurrer.

It was argued for the defendants that such a body could not be guilty of a malicious intention. The case of *Whitfield v. South Eastern R. W. Co.*, E. B. & E. 115, was sought to be distinguished, because in that case the defendants published the libel in the transmission of the telegraph message, which business they were authorised to carry on; whereas the wrongful act charged against the omnibus company the company was not authorised to commit, and could not, as a corporation, commit; but their servants, who did the acts, were alone answerable for such acts. It was answered

the wrong complained of was done in driving the omnibuses of the company, which was the business the defendants were expressly incorporated to carry on.

Erle, C. J., in giving judgment, said, at p. 17: "The charge is a charge of a wilful and intentional wrong, and it was said 'that a corporation cannot be guilty of such a wrong, and therefore that the action does not lie.' But I should state that the whole of the acts that are charged against the defendants are acts connected with the driving of their," the defendants', "vehicles; and this is a company incorporated for the purpose of driving their omnibuses, and therefore the actual things done by the defendants are acts within the purpose of their incorporation; \* \* but being wrongfully done, we think clearly the action lies, and there are abundant authorities to shew that under those circumstances the action will lie. I take the whole tenor of authorities, from *Yarborough v. Bank of England*, down to *Whitfield v. South Eastern R. W. Co.*, to shew that an action for a wrong does lie against a corporation where the thing done is within the purpose of the incorporation, and that it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual \* \* And I may add, as an additional reason for our decision, the inconvenience to the public that would arise if we were to hold that these companies incorporated for the purpose of trade had a restricted limitation put upon their liability by reason of such incorporation, and were exempt from responsibility because they intentionally wronged the public. We think it extremely important, where such companies admit they have in fact intentionally committed a wrong, the public should have a remedy against them, and not be driven to an action against their servants and others whom they have employed, and who may be entirely incapable of giving the recompense which the law may award."

Judgment was therefore given for the plaintiff.

Where a receiver of taxes issued his warrant against one who was not the owner of the land assessed to collect the

tax: Held, the corporation, whose officer the receiver was, was liable for his acts: *McSorley v. The Mayor, &c., of St. John*, 6 S. C. R. 531.

In an action for malicious prosecution against a railway company for the arrest of the plaintiff by an officer of the company on a charge of theft, the plaintiff, though he denied the theft on the trial, was nonsuited. Kelly, C. J., and Cleasby, B., set aside the nonsuit, Bramwell, B., dissenting, upon the ground that such an action will not lie against a corporation aggregate, for such a corporation is in law incapable of acting maliciously: *Henderson v. Midland R. W. Co.*, 24 L. T. N. S. 881.

In *Abrath v. North Eastern R. W. Co.*, 11 App. Cas. 247, per Lord Bramwell, p. 250, *et seq.*—although no question was made in the Courts below, 11 Q. B. D. 79 and 440, whether the action would or would not lie against a corporation aggregate for malicious prosecution. Lord Bramwell said in the House of Lords: "I am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative." He said a corporation is incapable of malice or motive. He admits a corporation may commit a trespass. He says a corporation "may be liable for the publication of a libel. \* \* A man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose a corporation published a newspaper, or printed books, and suppose that it was proved against them, that a book so published had been read by an officer of the corporation in order to see whether it should be published or not, and that it contained a libel, an

action lies there, because there is no question of actual malice or ill will or motive."

If privilege were set up to such an action, and the plaintiff had to fall back upon showing *express malice*, it would seem that would not be allowed if the opinion of Lord Bramwell be correct. Here privilege is *prima facie* shown in the statement of claim, but it may have been abused and so forfeited. I do not think I can look at the statement of defence in favour of the defendants, to shew the charges, or any of them, were sustained on this demurrer. The plaintiff expressly avers they were not proved, and that is a fact which is in issue.

These observations of Lord Bramwell are confined to actions in which malice, in fact, is an essential ingredient, such as in an action for malicious prosecution, and not in other cases, *as in libel* in which *malice in law at the most is all that is required*, or is all that is inferred from the mere fact of the act being wrongful by reason of its being a libel. That is a *false* publication, not necessarily a malicious publication.

In this case the defendants, by demurring, admit that the statement of claim is true, if it is sufficient in law; that is, that they made certain charges against the plaintiff, and published in printed documents certain matters against him, accusing him of certain acts of a grave and prejudicial nature calculated, and with intent to injure him; and, as it is, I think, sufficient in law, they must rely upon the issues in fact: *Leyman v. Latimer*, 3 Ex. D. 352; *Chamberlain v. Boyd*, 11 Q. B. D. 407, 413-415.

The defendants cannot properly say the matters charged against the plaintiff are matters in which the defendants are not interested as a corporate body; for the statement of claim shews the defendants, a municipal corporation, were and are directly interested, and that they had an action pending against the plaintiff in respect of the said matters, or of several of them. And the argument that the defendants are not liable in this action because the members of the corporation, that is, the inhabitants of the county, are a



fluctuating body, and are not the same as those who were members when the charges were made against the plaintiff, is of no consequence, for that could be a defence to every rate imposed, and to every action brought by the county, as well as an answer to every action of contract or of tort brought against the county: *Williams v. Beaumont*, 10 Bing. 260, 271.

The result is, there is not one case against a corporation aggregate being chargeable with libel, although, as I said, if Lord Bramwell's opinion be sustained, an aggregate corporation could not be sued if the question of express malice became necessary to be shewn to take away the privilege. I cannot of course act upon that opinion as the established law.

There are some acts which it cannot commit—murder, incest, adultery, and, it is said, corruption, per Pollock, C. B., in *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87, 90. It may, however, maintain an action for libel which is injurious to it: per Martin, B., 92.

There are many cases in which an aggregate corporation has been held to be liable for malicious prosecution; but Lord Bramwell in *Abrath v. North Eastern R. W. Co.*, 11 App. Cas. 247, before referred to, maintained, as he did in the case of *Henderson v. Midland R. W. Co.*, 24 L. T. N. S. 881, that it cannot be liable in such a case; and I infer also in no case in which the action is based upon a wrongful intent, express malice or motive; and he said as to libel, at p. 253, "that unfortunate word 'malice' has got into actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive."

The result is, as I find this to be an action for libel, I decide against all the grounds of demurrer. The costs would have been costs in the cause to the plaintiff as of course; but as the plaintiff has maintained the first seven paragraphs of his statement of claim to be a proceeding for a malicious prosecution, I give no costs of the argument to either party.

## [COMMON PLEAS DIVISION.]

## BEAM ET AL. V. SIMPSON MERNER.

## BEAM ET AL. V. ABSALOM MERNER.

*Patent of invention—Assignee using invention—Right to dispute validity of—Combination—Manufacture upon or after principle of invention—Evidence—Parol evidence—Admissibility of—Res judicata—Partnership.*

Action to recover royalties alleged to be payable on threshing machines manufactured by defendant under an indenture made between plaintiff B. and defendant, whereby the plaintiff B. sold and transferred to the defendant the right to manufacture and use a certain invention known as "Beam's Thresher"; and in consideration thereof the defendant agreed to pay a named royalty on all machines manufactured "upon or after" the principle of the invention. The plaintiff B. subsequently assigned to his co-plaintiff F. one half share or interest in the invention, and also one-half of the moneys then, and to grow, due under the indenture. The plaintiff's patent was for a combination, part only of which was used by defendant. The machines in question were manufactured after the assignment to F. The defendant objected that the patent was invalid on the ground of want of novelty in the invention, and that it was not the subject of a patent; and also that the machine was not manufactured on the principle of the plaintiff's patent. Parol evidence was admitted, subject to objection, that the plaintiff agreed to prevent any infringement of the patent, and, if he failed to do so, he should not be entitled to any royalties. The agreement contained no such stipulation.

*Held*, (1) that the defendant having used the plaintiff's invention, could not raise the objection to the validity of the patent. (2) That whether the machines were or not manufactured "upon or after" the principle of the plaintiff's patent, was a question for the jury on the evidence, and they having found, as they were warranted by the evidence in doing, that they were so manufactured the finding could not be interfered with. (3) That the parol evidence was not admissible to vary the deed, following *McNeely v. McWilliams*, 13 A. R. 324; and also that by a prior judgment of the Q. B. D., the matter was *res judicata*, and the fact that the judgment was between B. alone and defendant, could make no difference.

In an action under a similar agreement, the defendant partially manufactured a number of machines, and then sold out his establishment to a firm M. D. & Co., who completed the machines, and labelled them as required by the contract. Afterwards the defendant took M.'s place in the firm, and the firm manufactured a number of machines upon and after the principle of the plaintiff's patent which they labelled with another name from that required by the contract. The plaintiffs sued for the royalties, and for not labelling as required.

*Held*, that the plaintiffs were entitled to recover as for a manufacture and sale by defendant, for they might assume that the defendant was making the machines under the contract, and that the firm were but agents working for him.

THESE cases were tried before O'Connor, J., and a jury, at Berlin, at the Spring Assizes of 1886.

The plaintiffs, Beam and Frost, in the case against Simpson Merner claimed, to recover from the defendant certain royalties, or sums payable under and by virtue of an indenture, under seal, made by and between the plaintiff, John Adam Beam, and the defendant, bearing date the 21st day of November, 1882, whereby the plaintiff, Beam, sold and transferred to the defendant the right to manufacture, and sell to others at the manufacturing premises of the defendant, in the village of New Hamburg only, and not elsewhere, a certain invention, known as "Beam's Thresher," for the term of five years from the 3rd day of June, 1882; and the defendant covenanted and agreed to pay to the plaintiff, Beam, the sum of \$40 for each threshing machine manufactured by him upon or after the principle of the said invention; payment to be made on the first day of February in each year for machines manufactured and sold during the year; and to keep a full and detailed account of the sales made by him.

The plaintiffs in their statement of claim alleged that the indenture embodied correctly the true agreement between the parties, with the exception that the royalty agreed to be paid was the sum of \$30 each for the first ten machines manufactured, and \$25 for each subsequent machine; and that it was by oversight and mutual mistake that the correction was not made in the engrossment of the said indenture; and the plaintiffs prayed to have the indenture reformed in that particular. The plaintiffs averred that the defendant manufactured and sold between the 1st of February, 1885, and the 1st of February, 1886, 35 threshing machines upon the principle of the said invention; and there became and was due to the plaintiffs the sum of \$875 in respect of the said royalties, on account of which the defendant had paid only \$107.50.

The plaintiff, Beam, by an assignment in writing, dated the fifth day of September, 1885, assigned to his co-plaintiff an individual half share or interest in the said invention and one-half of the moneys then due and to grow due under the agreement with the defendant.

The defendant, by his statement of defence, denied the allegations in the plaintiffs' statement of claim, and alleged that the said indenture did not contain the entire agreement between the plaintiff, Beam, and the defendant, but that in addition to the matters therein, it was before and at the time of the execution of the said indenture agreed by the plaintiff, Beam, that in case any person or persons should within the Dominion of Canada manufacture any machine or machines upon the principle of the said invention, or the making of which should be an infringement upon the patent, the plaintiff, Beam, would, at his own cost, commence and carry on all such actions as should be necessary to establish the validity of the patent and to put a stop to the manufacturing of such machines by such other person or persons; and he, the plaintiff, Beam, would not call on the defendant for the payment of any royalties, nor should the defendant be liable thenceforth to pay any royalty, nor should the said indenture be enforced in any way, until the plaintiff, Beam, should, by authority of law or otherwise, have restrained such person or persons from manufacturing such machines. That since the making of the indenture, and before and since the 1st of February, 1885, other manufacturers had been and were infringing the said patent by making threshing machines upon the principle of the said invention, and the defendant notified the plaintiff, Beam, of such infringement a reasonable time before the 1st February, 1885, but the plaintiff, Beam, then neglected, and had ever since neglected to take the necessary proceedings to put a stop to such infringement. That, in addition to the matters in said agreement, it was before and at the time of the execution thereof by the defendant, promised and agreed by the plaintiff Beam, that he, the said plaintiff, would not allow or permit others than the defendant to make or sell machines upon or after the principle of the said invention without paying a royalty equal to or more than that agreed to be paid by the defendant; and that since the making of the agreement others, with the license or consent of the plaintiff, Beam



were making and selling threshing machines upon and after the said invention without paying royalty equal to or more than that agreed to be paid by the defendant, or any royalty whatever. By reason whereof the defendant has been compelled to sell the machines made by him at a lower figure than that paid by the said indenture, and at less than cost price. And by reason of the premises the plaintiffs are not entitled to enforce the said indenture against the defendant.

The defendant further set up that he entered into the said agreement upon the representation of the plaintiff, Beam, that the said patent of invention was for a threshing machine which was useful and workable, and better than any other machine in the market; whereas, in truth and in fact, the said patent of invention was a machine which was unworkable, useless, and unsaleable as a threshing machine, and for the purpose for which it was intended, as the plaintiff, Beam, well knew; and in consequence of such false representation the defendant was entirely unable to make a machine in accordance with the said patent, which he could sell at more than cost price, or that he could make to work satisfactorily; and was put to great loss and damage in endeavouring to make the said invention workable.

Further, that the indenture contained an agreement by the plaintiff, Beam, that he would assist to make work satisfactorily any machine made after said invention which did not at starting work smoothly or well; and the defendant after he had begun to manufacture said machines, under the said indenture, was unable to make them work smoothly, satisfactorily, or well, and though the plaintiff, Beam, endeavoured to make them work smoothly, satisfactorily, or well he was unable to do so, and has never done so; and so the defendant said there was a total failure of consideration for the said agreement.

The defendant also alleged that when he entered into the said indenture he was wholly without independent professional advice, and was procured to execute the same

by fraud and undue influence ; and the same was so grossly improvident as to shock the conscience and afford conclusive evidence of fraud ; and the said indenture was not binding on the defendant.

The plaintiffs replied, taking issue upon the statements of the defendant ; and pleaded by way of estoppel, that the plaintiff, Beam, brought an action in the Queen's Bench Division of the High Court of Justice, to recover the amount that had, under the said agreement accrued due to him from the defendant up to the 1st of February, 1885, for royalties and machines manufactured and sold by the defendant previous to that date ; and the defendant duly filed his statement of defence in the said action, and stated therein that at the time he executed the indenture the plaintiff Beam represented to him that he was the first and true inventor of the supposed invention, and that he had a valid and subsisting patent for the said supposed invention. (2) The said plaintiff further represented and promised that if the defendant would enter into the agreement, the said plaintiff would not allow or permit others than the defendant to make or sell machines, upon or after the principle of the supposed invention, without paying a royalty equal to or more than that agreed to be paid by the defendant ; and that the said plaintiff would prosecute any and all infringers of the said alleged patent, and would protect the defendant in the enjoyment of the right to make and sell the said supposed invention. (3) The said plaintiff further represented to the defendant, and agreed with him, that if he failed to prosecute such infringers, and to protect the defendant, then that the said indenture should not be enforced against the said defendant. (4) The defendant says that he executed the said indenture relying implicitly upon and induced by the said representations and promises of the said plaintiff. (5) The said plaintiff was not in fact the true and first inventor of the said supposed indenture, as represented by him ; and the said pretended patent was not, and is not, a valid and subsisting patent as represented by the said plaintiff. (6) By the said indenture the minimum rate

for which said machine should be sold by the defendant was fixed at \$275, and the making of said machines by others, without payment of a royalty, would enable them to sell the same at a sum below said fixed price, and would prejudice the sale of said machines made by the defendant during the whole term covered by said agreement. (7) The defendant says since the making of said indenture other manufacturers for a long time have been, and now are infringing the said pretended patent, by making and selling threshing machines upon or after the said supposed invention, for the price of from \$225 to \$250, without the consent of the plaintiff, and without the payment of any royalty; and the said plaintiff has failed to prosecute for any such infringement, and to protect the defendant as promised. (8) The defendant has often requested the said plaintiff to make good his said representations and promises, and to prosecute said infringers and to protect the defendant, but the said plaintiff has neglected so to do though he has frequently promised the defendant to do so; and the defendant relying implicitly upon said promises was induced by the said plaintiff to make large payments on account of said royalty, although he had previously refused to make any further payments until the said plaintiff restrained such infringements. (9) By reason of said infringements defendant has lost and been deprived of the profits which would otherwise have accrued to him by the sale of said supposed invention. (10) The defendant submits that by reason of his failure to carry out his said representations, the said plaintiff is not entitled to enforce the said indenture against the defendant. And the said plaintiff afterwards replied to the said defence by joining issue upon the said statement of defence, and such proceedings were afterwards had in the said action, that afterwards the issues so joined in the said action, as aforesaid, came on for trial before the Hon. Mr. Justice Cameron on the 8th of October, 1885; and upon the said trial the said Mr. Justice Cameron found as follows: "I find that the defendant entered into the agreement with the plaintiff in

the plaintiff's statement of claim mentioned; and that the defendant made and sold, up to the 1st of February, 1885, thirty-eight of the machines in the statement of claim mentioned; and the defendant paid in respect of the royalty payable by him on the said thirty-eight machines, the sum of \$526.91; and there is still due and payable to the plaintiff, under the said agreement on account of the said thirty-eight machines, the sum of \$473.09, and for interest thereon from the 1st of February, 1885, \$18.84, in all \$491.93. I further find that the allegations in the defendant's statement of defence have not been proved, and it having been agreed between the parties that the statement of defence should be treated as a counter-claim to recover damages for the breach of the plaintiff's agreement therein set forth, I dismiss the said counter claim, and direct that judgment be entered for the plaintiff for the sum of \$491.93, with costs of suit." And that thereupon judgment was entered in the said action; and the defendant paid the said sum of \$491.93, and the costs of the said suit. And the plaintiffs say that the said several matters set up by the defendant in his defence to this action are the same as those in the said former action.

At the trial evidence was given on behalf of the defendant of the agreement, in his statement of defence alleged, in addition to the matters in the indenture contained, subject to the objection that such evidence was inadmissible to alter or vary the terms of the written agreement. And the plaintiffs put in an exemplification of the judgment mentioned in the plaintiffs' replication, and pleaded by way of estoppel judgment recovered in the former action of the plaintiff, Beam, against the defendant.

The learned Judge submitted certain questions to the jury, which, with their findings thereon, were as follows:

(1) Did the indenture in writing contain the whole of the agreement, except as to the price between the parties?  
A. No.

(2) Was there an agreement by the plaintiff, Beam, that he should not be entitled to be paid royalties if he failed



to prevent any infringement of his patent, or if he allowed other persons to sell at less royalties than Simpson Merner was to pay? A. Yes.

(3) Has the plaintiff, Beam, kept that agreement? A. No. If not, in what respect has he broken it? A. In not protecting the manufacturers.

(4) If the plaintiff, Beam, has broken that agreement, what damages is the defendant, Simpson Merner, entitled to as against the plaintiffs? A. No damages.

(5) Did the plaintiff, Beam, break his agreement to assist in making machines work smoothly and well? A. Yes.

(6) If so, what damages is the defendant entitled to for such breach of his agreement? A. One dollar damages.

(7) Was the agreement of the 21st November, 1882, obtained by plaintiff, Beam, from the defendant, Simpson Merner, by fraud, or fraudulent misrepresentation? A. No fraud.

(8) Are the machines made by the defendant since 1st February, 1885, constructed upon or after the principle of Beam's invention? A. Yes.

The questions so submitted were agreed upon before they were submitted to the jury by the counsel for the plaintiffs and defendant.

The learned Judge, on the findings of the jury, directed judgment to be entered for the plaintiffs for \$567.50, on account of royalties payable; and directed that the sum of \$1 damages, found by the jury on the defendant's counter-claim should be deducted from the amount allowed to the plaintiff.

In the case of the plaintiffs against Absalom Merner the only difference between them was, that in the latter there was no question of estoppel by judgment recovered; and, except as to the manufacture of thirteen threshing machines, the manufacture of the machines was not by the defendant alone, but by the firm of Merner, Keller & Co., of which the defendant was a partner.

The plaintiffs, by their statement of claim, claimed for royalties and for damages for breach of the contract of the defendant to label all machines manufactured under the agreement by him with the name, John A. Beam, as patentee, and the year of granting the patent.

From the evidence it appeared that the defendant entered into an agreement under seal, as in the statement of claim alleged, to pay the plaintiff, Beam, \$25 royalty on each machine manufactured and sold by the defendant on the principle of the plaintiff's invention; that he had partially manufactured thirteen machines and then sold out his establishment to Messrs. Moore, Keller & Co., who completed these thirteen machines and labelled them as required by the contract. Afterwards the defendant took the place of Mr. Moore in the firm, which became Merner, Keller & Co. This new firm manufactured a number of machines, as found by the jury, on the principle of the plaintiff, Beam's, patent, which they labelled "Waterloo Chief." The action was brought by the plaintiffs—the plaintiff, Beam, having assigned to his co-plaintiff, Frost, a half interest in the patent and in the contracts—to recover, royalties on these machines, and damages for not labelling them as required by the contract.

The plaintiff claimed royalties at \$25 each on 42 machines, and damages for not labelling 29 of such machines according to the terms of the contract. The defendant in respect of 13 machines, labelled by him as required by the contract, pleaded a tender of \$343.20, being \$325 for royalties and \$18.20 for interest and costs.

The jury found that the machines were manufactured after the principle of the plaintiff, Beam's patent; and they found the plaintiffs had sustained damages to the amount of \$5 for breach of the defendant's covenant to label the machines.

On this finding, the learned Judge directed judgment to be entered for the plaintiffs for \$800, being the amount unpaid for royalties due on the 1st February, 1886, upon 32 machines manufactured and sold by defend-

ant, and for which he was liable at that time; and also for \$5 damages for not labelling the machines so manufactured and sold, with costs of suit.

In Easter Sittings, May 22, 1886, *E. P. Clement*, in the case against Simpson Merner obtained an order *nisi* calling on the plaintiffs to shew cause why the findings of the jury, and the judgment for the plaintiffs entered thereon, should not be set aside and judgment entered for the defendant, on the grounds (1) that upon the plaintiffs' own evidence they did not shew themselves entitled to any finding or judgment against the defendant; (2) or why the said findings and judgment should not be set aside and a new trial had between the parties, on the ground that the findings of the jury are against law and evidence; (3) or why the damages assessed by the jury in the defendant's favour should not be increased from \$1 to \$800; (4) or why the judgment for the plaintiffs should not be set aside and judgment entered for the defendant, on the ground that upon the proceedings the defendant is entitled to judgment.

The defendant also gave notice of motion to the same effect as the order *nisi*.

In the same sittings, *Colquhoun* obtained a cross rule calling on the defendant to shew cause why the first, second, and third findings of the jury should not be set aside on the grounds (1) that the same are contrary to law and evidence and the weight of evidence. (2) That the same cannot be supported without resorting to parol evidence varying the terms of the written contract between the parties. (3) That the questions in issue in this action, and referred to in the said findings, have already been passed upon and decided in a former action between the same parties, and thereby became *res judicata*, and defendant was thereby estopped from contradicting in this action facts which had been established in the former action.

In the same sittings *E. P. Clement*, in the case against Absalom Merner, also obtained an order *nisi*

calling on the plaintiffs to shew cause why the findings of the jury should not be set aside, and judgment entered for the defendant, upon the ground that upon the plaintiffs' own evidence they did not shew themselves entitled to any finding or judgment against the defendant ; (2) or why the said findings and judgment should not be set aside and a new trial had between the parties, on the ground that the findings of the jury are against law and evidence ; or why the sum for which judgment for the plaintiffs is directed to be entered should not be reduced to the sum of \$343.20, without costs, on the ground that on the law and findings of the jury, and the evidence, the plaintiffs are not entitled to any greater amount than the said sum of \$343.20.

In Michaelmas Sittings, December 1, 1886, *Osler*, Q. C., and *Clement* supported the defendants' orders *nisi* and motion in each, case, and shewed cause to the plaintiffs order *nisi*, and referred to *Barter v. Howland*, 26 Gr. 135 ; *Rubber Co. v. Goodyear*, 9 Wall. 788, 799 ; *Gray v. Billington*, 21 C. P. 288 ; *Voss v. Fisher*, 113 U. S. 213 ; *Rowell v. Lindsay*, 113 U. S. 97 ; *Imhaeuser v. Buerk*, 101 U. S. 647.

*John King*, contra, for the plaintiffs against Absalom Merner, referred to *Green v. Watson*, 2 O. R. 627, 634 ; *Pitts v. Jameson*, 15 Barb. 310 ; *Curtis's Law of Patents*, secs. 215-7, 307-8 ; *Sellers v. Dickinson*, 5 Ex. 312.

*Colquhoun*, contra for the plaintiffs against Simpson Merner, referred to *McNeeley v. McWilliams*, 13 A. R. 324 ; *Herman* on Estoppel, 834.

March 12th, 1887. CAMERON, C. J.—In the case against Simpson Merner, I am of opinion the defendant, while he continues to use the plaintiff, Beam's, invention, cannot dispute the validity of the patent on the ground of want of novelty in the alleged invention, or that it was not the subject of a patent. *Gray v. Billington*, 21 C. P. 288 ; *Green v. Watson*, 2 O. R. 627, 634, are authorities in our own Courts to this effect, and are based upon English decisions that leave no room for doubt upon the



question. The question whether the threshers manufactured by the defendant were manufactured after the plaintiff, Beam's, patent, was one of fact for the jury, and they have found upon evidence which supports the finding in favour of the plaintiff, and there is no sufficient ground shewn why the finding should not be allowed to stand.

It was contended that the plaintiffs' patent was for a combination, and in the defendant's machines part of the combination was omitted; but the defendant's own evidence shewed that he used other parts of the invention in the same combination as was claimed by the patent to accomplish the purpose intended by the invention, and the parts omitted were not essential to the accomplishment of this purpose. The combination so used by the defendant was different from that used in other machines to accomplish a like purpose, though each of the things in combination was old and in use before the patent. The model machine by which the defendant was to be guided in manufacturing threshers under the agreement had not the lower returnable and distributor, which were part of the invention claimed by the patent, and the omitting to use which, according to the defendant's contention, prevented machines manufactured by him coming under the agreement.

It was a question of fact, as I have already intimated, whether the machines made by the defendant were made on the principle of the plaintiff, Beam's, invention, and the jury, in my judgment, were quite warranted in the conclusion they came to.

The objection remains to be considered, that the indenture does not contain the whole agreement between the parties. This the jury have found; and, if the evidence on which their finding is based, was not inadmissible, and the defendant is not estopped by the judgment recovered in the Queen's Bench, the Court could not properly interfere with the finding, as unquestionably the evidence, if credited, supports it. The defendant certainly seeks to vary the written agreement by adding a term of defeasance, that is to say, the plaintiff agreed to prevent

any infringement of the patent, and if he failed so to do he should not be entitled to any royalties. The jury have found the plaintiff, Beam, made this agreement and has failed to protect the defendant.

I do not think this case is distinguishable in principle from *McNeely v. McWilliams*, 13 A. R. 324. The head-note to that case is as follows: "The defendants in writing offered the plaintiffs 'to furnish scows, and deliver all the stone required for the Omemee bridge, as fast as you require them, for the sum of seventy-five cents per cubic yard, which the plaintiffs, in writing, accepted 'at the price and conditions named.' *Held*, that parol evidence could not be received to show that the delivery was only to take place in case the water, along the lake and river route over which the stone had to be carried, was of such a height as would enable the defendants to use their steamer in towing the scows."

The cases upon this vexed question are very fully reviewed and considered in the case, with the above result. It would profit nothing to make further reference to them here.

It may be observed that there was much more formality in making the agreement here than in that case. The aid of a lawyer in preparing the indenture having been obtained, and the matters now raised as a defence were discussed and deliberately left out, the defendant appearing to place confidence in the plaintiff, whose interest it seemingly was to protect the patent from infringement.

I think, also, the judgment in the Queen's Bench Division, in the action between the plaintiff, Beam, and the defendant, estops the defendant from again raising this contention. The fact that that action was between the plaintiff, Beam, alone and the defendant, is not, as was contended by Mr. Osler, a valid objection to the validity of the judgment as an estoppel.

The plaintiff, Frost, has no right or interest in the matter different from the plaintiff, Beam. It is Beam's right that is involved, and Frost takes but as Beam's assignee

and in conjunction with him. Had the judgment been in favour of the defendant, the plaintiffs would not be permitted to litigate the same question again, simply on account of Frost joining Beam in the action. I think there can be no doubt whatever the estoppel applies, and the matter is *res judicata*.

The defendants' order *nisi*, and motion, must therefore, be discharged; and the plaintiffs' motion to set aside the first, second, and third findings of the jury be made absolute, with costs.

As to the case of the plaintiff against Absalom Merner, the opinion expressed in the case against Simpson Merner covers all the points involved in this, except the one, was the manufacture and sale of the machines by the firm of Merner, Keller & Co. such a manufacture and sale by the defendant as entitles the plaintiffs to recover the royalties therefor, payable under the contract, and damages for the breach of the contract in not labelling the machines with the name of the plaintiff, Beam, as required by the contract?

I had very considerable doubt upon the argument, and since, as to the force of the defendant's contention. There is no doubt a partnership, or firm of several persons trading together in co-partnership, constitutes a different entity or being from the individual members of the firm. Thus the firm of Merner, Keller & Co. was distinct from the defendant Merner; but at the same time when that firm acted Merner acted, and when the firm made the machines Merner made them; and though I think it true, as contended, that the plaintiffs might have sued the members of the firm as wrong doers for an infringement of the patent, in which case they might have set up the invalidity of the patent and have that question tested, he was not bound to so treat them, but was at liberty, as he has done, to assume the defendant was making the machines under the agreement, and his co-partners were but agents working for him. If this be a correct conclusion, it follows that he cannot dispute the

validity of the patent, and all it is open to him to maintain is, that the machines made by the firm were not made upon or after the principle of the patent. That these machines were made after the model indicated by the plaintiff does not admit of question upon the evidence; and this model, as far as it goes, was constructed after or upon the principle of the patent. There is no difference in the method of construction of the machines made by the firm and those made by the defendant, and labelled with the name of the plaintiff, Beam, and the date of the patent. It is beyond question, therefore, that the defendant availed himself of the license, in the first instance, to enable him to make this very machine, and while the agreement continues in force, I do not think he can be permitted to say that he is not working under the contract when he makes this machine, and the jury were warranted in their finding, in fact, that the machines, in respect of which the royalties are claimed, were made after the principle of the plaintiffs' patent.

The plaintiffs are, therefore, entitled to the judgment, both in respect of the royalties and damages for not labelling the machines.

The defendant's order *nisi* must therefore be discharged with costs.

ROSE, J.—The claim in this patent is for a combination, or rather for four combinations, as follows :

"1. The straw carrier, grain tables, skeleton rake, and *distributor* constructed, connected and disposed substantially as shewn and described in combination with the framing, cylinder, fanshoe and other parts of an ordinary threshing machine.

2. The combination with the frame work of the machine, of the straw carrier, consisting of a channel C. perforated boards B., having ridges on the top and bottom, and the end boards B. having a ridge below—all having a slight movement, the serrated and spiked rakes fitting between the boards and leaving a quick movement, and the crank shafts supporting and actuating the same.



3. The combination with the straw carrier of the stationary grain tables G. G. and the skeleton rake R. S. sweeping the said tables.

4. The distributor having tables partly perforated and partly blank, and the perforations being of different sizes with a plain return table between them, and receiving a vibratory movement in combination with the framing, grain tables and shoe."

The defendant, Simpson Merner, entered into an agreement with the patentee, dated the 21st November, 1882. The agreement recites the fact of the issuing to the plaintiff of a patent "for certain new and useful improvements on threshing machines," which is called or known by the title or name of "Beam's Thresher;" and that the plaintiff Beam had agreed for the sale and transfer to the defendant, and that the defendant had agreed to become the purchaser from the said plaintiff, of a shop right to manufacture and sell the invention, upon the terms and conditions, and subject to the stipulations thereafter contained.

The agreement thus provides: "(1) That the said Beam hereby sells and transfers unto the said Merner the right to manufacture and sell to others at the manufacturing premises of the said Merner, in the said village only and not elsewhere, the said invention \* \* ." "(2) That the said Merner shall pay to the said Beam therefor the sum or royalty of \$40 for each threshing machine manufactured by him upon or after the principle of the said invention.

\* \* (3) \* \* And that he (defendant) will not vary or change the construction of the said machines in any respect from the said invention."

The 4th covenant provides for the defendant doing "all in his power to introduce to the favourable notice of the public, and push the sale of the said invention within the territories of the Dominion."

The assignment to Absalom Merner was not put in; but an agreement is among the papers referring to it by recital. It was dated the 30th of January, 1883, and was, as I understood, similar in terms to that with Simpson Merner.

The defendant, Absalom Merner, entered into a partnership, and the firm of which he was a member manufactured the machines.

Mr. Osler contended that the license to manufacture and sell was a personal one, and did not enure to the benefit of the firm, citing *Rubber Co. v. Goodyear*, 9 Wall. 788, 799, 800. See also *Walker* on Patents, sec. 310; *Bump* on Trade Marks, Labels, and Copyrights, 2nd ed., p. 186, and *Terrell's* Law of Patents, p. 119; and argued that it followed that the firm were not working under the agreement, and hence the defendant was not bound or estopped by its terms.

It appears from the same authorities that the patentee may waive his right to object to the non-assignability of the license, and may treat the assignee as acting under the license.

It follows that he may treat the licensee as not violating the terms of the license, but as acting under it when he causes machines to be manufactured for which he holds the license.

As licensees, the defendants cannot dispute the validity of the patent, or indirectly attack it. This was admitted by counsel in *Adie v. Clark*, 3 Ch. D. 134, at p. 141, and stated as undoubted law by James, L. J., at p. 142.

But "A licensee is entitled to shew the limits of the patent, and that he is outside those limits:" *Same Case*, p. 142.

The patent must therefore be taken to be valid and unimpeachable by the defendants.

Was either defendant working outside of its limits?

It is alleged a model was given by the plaintiff Beam to the defendants of a machine from which was omitted the lower distributor and return-table, as shewn in the patent; and the defendants contend that, having manufactured according to that model, they were not using the patented combination and hence were not working under the agreement.

This contention has caused me to examine the authorities with care.

It would seem to be reasonably clear law that a patent for a combination is not a patent of the various parts, but of the whole combination; and that to constitute an infringement of a combination the whole combination must be used. See *Bump* on Trademarks, Labels, and Copyrights, 2nd ed., p. 303; *Walker* on Patents, sec. 349.

"But there is, or may be, an essence or substance of the invention underlying the mere accident of form; and that invention, like every other invention, may be pirated by a theft in a disguised or mutilated form, and it will be in every case a question of fact whether the alleged piracy is the same in substance and effect, or is a substantially new or different combination:" James, L. J., in *Clarke v. Adie*, L. R. 10 Ch. 667, at p. 675.

It would seem as if *Lister v. Leather*, 8 E. & B. 1004, cannot be relied upon as taking the law farther than as stated in *Clark v. Adie*.

In the patent before us there are four claims; in fact, four inventions, each of which is patented.

A machine manufactured in which any one of the four combinations was used, would be an infringement of the patent and render the party so using it liable to the patentee.

Under the patent, and the agreement or license, the defendant had the right to use all four. He says he has used only two, viz., 2 and 3, as Nos. 1 and 4 are combinations with the distributor and return-tables, which were not in the machines manufactured by him. He further says he was misled by the plaintiff, Beam, into using only part of the invention.

The jury have negatived fraud on the part of that plaintiff, and the defendant had full opportunity of ascertaining the contents of the patent and agreement under which he was working.

Apparently the defendants were quite content to enter into the agreement to manufacture the machine without the distributor or return table. These did not influence them. The machine must have been approved as superior on other grounds; and the defendants may now, having

discovered that their rights are larger than they supposed, have the full advantage of manufacturing machines with all the parts. Indeed, Simpson Merner has covenanted not to vary or change the construction of the machines in any respect from the invention, and it may be Absalom Merner's assignment contains the same covenant.

The agreement by each is, that he shall pay the royalty for each machine manufactured by them *upon or after* the principle of the said invention.

The jury have found that the machines were "constructed upon or after the principle of Beam's patent."

That, according to *Clark v. Adie*, L. R. 10 Ch. 667, was a question of fact for them, and upon the particular facts of this case, and the wording of the covenant, I cannot find any ground upon which to interfere. It seems to me the words "upon or after" are wider than "upon" alone, and without saying that if the words "or after" had not been inserted there would be any room for a different contention, I am of the opinion the agreement provides for a construction after the principle of the invention, which means something more than a rigid compliance with the form. I have considered *Grip Printing and Publishing Co. v. Butterfield*, 11 S. C. R. 291, 296.

A careful reading of the judgment of the learned Chancellor, affirmed by the said Court, shews, I think, that the law is not carried farther than in *Clark v. Adie*, L. R. 10 Ch. 667.

The learned Chancellor thought the defendant was estopped by his partnership with the plaintiff from saying that the non-user, or the rejection of the part, destroyed the patent, or materially affected the combination of parts; and relied on *Chambers v. Crickley*, 33 Beav. 374; and also found that the defendant was making substantially the same kind of books as those of the plaintiff, with some modifications which might or might not be improvements.

I venture to say that the decision must be confined to a finding: 1st, of law, *i. e.*, estoppel; and 2nd, of fact that the books were substantially the same. The judgment of the Supreme Court is confined to the latter ground.



There is no declaration that if A. by a combination of say seven parts accomplishes a certain result, and obtains a patent for the combination only, B. may not by a combination of say five of these parts accomplish the same results without infringement, provided always that the combination of the five parts is a substantially new or different combination.

The head note in *Clark v. Adie*, L. R. 10 Ch. 667, is: "A patent for a combination of several improvements is not infringed by using a combination of some only of those improvements."

This of course must be read in the light of the judgment.

I am, therefore, of the opinion that the defendant constructed the machines under the license, and must pay the royalty.

For convenience of reference, I may note that *Clark v. Adie* appears in various stages in L. R. 10 Ch. 667; 33 L. T. N. S. 295; 2 App. Cas. 315 and 423; 3 Ch. D. 134. 2 App. Cas. 315 and 423, and may be conveniently referred to in *Terrell's Law of Patents*, p. 149, also in *Goodeve's Patent Cases*, p. 117.

GALT, J., concurred.

*Order nisi discharged.*

---

## [CHANCERY DIVISION.]

## THE ONTARIO AND SAULT STE. MARIE RAILWAY COMPANY.

## V.

## THE CANADIAN PACIFIC RAILWAY COMPANY.

*Railways—Bonâ fide commencement of work on—Special Act—General Act—Inconsistency between—Construction of.*

When a company is incorporated by a special Act, and there are provisions in the special Act as well as in a general Act on the same subject which are inconsistent; if the special act gives in itself a complete rule on the subject, the expression of that rule amounts to an exception of the subject matter of the rule out of the general Act.

When the rule given by the special Act applies only to a portion of the subject, the special Act may apply to one portion and the general Act to the other.

The probable intention of the Legislature is important in considering a matter of such a character.

The plaintiffs were empowered by their act of incorporation to construct a railway in sections between the River S.S.M. on the west, and G. on the east, and such railway was by the twenty-third section of their Act to be commenced within three years, and to be completed within six years from 4th March, 1881. In the years 1881 and 1882 they surveyed, located, and filed plans from the River S. S. M. easterly to S. R. about one third of the entire length of their road, and did some work thereon of the character of "construction" such as grading, blasting, and chopping. Little more was done by them from 1882 to 1886 owing to financial reasons, but with no intention of abandoning the road.

The defendants who had constructed a line of railway as far west as A. proceeded, in December, 1886, to continue the construction of their line westerly from A. to the River S. S. M., and in doing so used the line which plaintiffs had located.

*Held*, on the evidence, that the work done by the plaintiffs was a *bonâ fide* commencement of their railway within the three years required by their Act.

*Held*, also, that as the plaintiffs were authorized to construct their railway in sections, they were not bound before commencing work to file plans of their whole line.

By the General Railway Act R. S. O. ch. 165, which was by the plaintiffs special Act incorporated therein except as varied by the latter, ten per cent. of the capital of the railway was by sub-sec 5 of sec. 36 required to be expended within three years, and the railway was to be completed within ten years of the passing of the special Act, in default of which the corporate existence of the company ceased, and by section 4 of the special Act, sections 4 to 36 thereof inclusive were to apply to all railways authorized to be constructed by any special Act of the Province, and to be construed therewith as forming one Act.

*Held*, that section 4 of the general Act did not apply to the plaintiffs, and that section 23 of their special Act must be read in substitution for sub-sec. 5 of sec. 36 requiring the expenditure of ten per cent. of the capital within the three years.

THIS was a motion for an injunction made by the Ontario and Sault St. Marie Railway Company against the Canadian Pacific Railway Company to restrain the defendants from interfering with or trespassing upon the line of railway of the plaintiffs between the River Ste. Marie on the west, and Spanish River on the east, and to compel the defendants to remove all rails and obstructions placed on the line of railway of the plaintiffs, as located between the said points.

It appeared that the plaintiffs were incorporated by 44 Vic., ch. 68 (O.), two sections of which were in these words: "22. All the provisions of the Railway Act of Ontario, except as varied by this Act, shall apply to the said Company." "23. The railway shall be commenced within three years, and completed within six years of the passing of this Act."

That Act was assented to on March 4th, 1881.

The plaintiffs had filed plans for part of their line, and expended certain moneys in surveys and construction, but had discontinued the work since 1882, and the defendants were running their line on the plaintiffs' old line.

Two of the principal defences set up by the defendants were that the plaintiffs had abandoned their line, and that they did not commence work within three years.

The facts are more fully set out in the judgment.

The motion was argued on March 9th, 10th, and 11th, 1887, before Ferguson, J.

*S. H. Blake, Q. C., and Cassels, Q. C., for the plaintiffs.* The evidence shows there was a *bonâ fide* commencement of the work by the plaintiffs, and what happened afterwards cannot affect that commencement. There is no evidence of any intention of the plaintiffs to abandon their charter; but, on the contrary, there is evidence of their negotiations with others to carry on the undertaking. In *Re The Stratford and Huron R. W. Co. v. The Corporation, &c., of Perth*. 38 U. C. R. 112, the question of commence-

ment was discussed and considered. Even if some of the statutory preliminaries have been omitted, no one can take advantage of such omission but the power which granted the charter: *Re The New York Elevated R. W. Co.*, 70 N. Y. 327 to 337. This injunction should be granted even if the question as to the rights of the plaintiffs to go on with their road is not decided: *Cotton v. Corby*, 7 Gr. 50; *Ollendorff v. Black*, 4 DeG. & S. 209; *Kerr*, on Injunctions, 2nd ed. 13. Where plans are filed, and location defined, even if the owners of property taken are not paid, still the company filing the plan has a prior right and equity against a subsequent railway company: *Sioux City & D. M. R. W. Co. v. Chicago, M. & St. P. R. W. Co.*, 27 Fed. Rep. 770; *Morris v. Blair*, 1 Stockton, (N. Jer.) 635. The defendants have no more right to take plaintiffs' lands than if they belonged to private parties, and then they would have to proceed in the usual way to expropriate.

*Robinson, Q. C.*, and *Moss, Q. C.*, for the defendants. The question is: Who has the prior right? Both lines can be run, but both want the best and cheapest route. What the plaintiffs have done was no commencement with a *bonâ fide* view to carry out their charter. There was no legal commencement, because all the plans were not filed: R. S. O. ch. 165, sec. 10 sub-sec. 8; *Re The Stratford and Huron R. W. Co. and The Corporation, &c., of Perth*, *supra*; *Re Grand Junction Railway v. The County of Peterborough*, 6 A. R. 366 to 371. The plaintiffs' answer, that the plans were filed as to the work done, is not sufficient, for although 44 Vic., ch 68 (O.), gave them power to build in sections, it did not give them power to file their plans in sections. The filing of plans for their whole line, and proceeding in good faith and with reasonable diligence to complete the road, gave the defendants the prior right: *Contra Costa Coal Mines R. W. Co. v. Moss*, 23 Cal. 324. Surveys are not a commencement. The defendants cannot claim that the plaintiffs' charter under their special Act, is gone without some action on the part of the Legislature who



granted that charter; but they can under the general Act. Sections 4 to 36 of R. S. O., ch. 165, apply to every railway unless expressly varied by the special Act. The general Act, sec. 36, sub-sec. 8, provides for the ceasing of the corporate existence of the company if the road is not commenced within three years, and ten per cent. of the capital spent on it. That was not done here: *Maxwell's Interpretation of Statutes*, 2nd ed. 221; *Wilberforce's Statute Law*, 340; *Hardcastle's Construction and Effect of Statutory Law*, 110, 111; *Re Westminster Estate of the Parish of St. Sepulchre*, 4 D. J. & S. 232, at 242. The special Act here only fixes the time of commencement, and as it does not vary the amount to be expended under the general Act, the general Act applies as to that condition: *London, Chatham, and Dover R. W. Co. v. Wandsworth Board of Works*, L. R. 8, C. P. 189; *Attorney-General v. Great Eastern R. W. Co.*, L. R. 7, Ch. 475; 6 E. & I. 367. The capital of a company is the nominal or authorized capital. The corporate existence of the plaintiffs has ceased: *Brooke v. The Bank of Upper Canada*, 4 P. R. 162; *Angell and Ames on Corporations*, 11th ed., sec. 777; *Morawetz on Private Corporations*, 2nd ed., sec. 1006; *Pierce on Railroads*, 11; *The Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524; *Re Brooklyn, Winfield, and Newtown R. W. Co.*, 72 N. Y. 245; *The Oakland R. W. Co. v. The Oakland B. & F. V. R. W. Co.*, 45 Cal. 365, 371, 378; *Lindsay Petroleum Co. v. Pardee*, 22 Gr. 18. The defendants' power to build the road is undoubted. They were incorporated by the Dominion Parliament, 44 Vic., ch. 1 (D.), and even subsequent legislation by the Ontario Legislature would not revive the plaintiffs' charter so as to affect the defendants: *Re Hamilton, &c., R. W. Co. and Corporation of Halton, &c.*, 39 U. C. R. 93. See also *McLaren v. Caldwell*, 5 A. R. 363.

*S. H. Blake, Q. C.*, in reply. In *McLaren v. Caldwell*, *supra*, there was no detriment to property threatened by the defendants in exercising the right claimed. Surveys are part of the construction. When a general Act is incorpora-

ted in a special Act the latter prevails where they are inconsistent: *Maxwell's Interpretation of Statutes*, 2nd ed. 221. Here the special Act must prevail as it provides for the completion of the road within six years, while the general Act gave ten years, which is a clear variation: *Simpson v. The South Staffordshire Water Works Co.*, 34 L. J., Ch. 380; *Weld v. South Western R. W. Co.*, 32 Beav. 340; *Queen v. The Great Western R. W. Co.*, 1 El. & B. 253; *Mayor of Yarmouth v. Simmons*, 47 L. J., Ch. 792. Capital stock means the amount issued and actually owned: *The Greenpoint Sugar Co. v. Henry Whitin*, 69 N. Y. R. 328. See also *Pratt v. Morrison*, 17 Hun., N. Y. S. 475; *Van Wyck v. Knevals*, 106 U. S. R. 360, at 368.

March 19th, 1887. FERGUSON, J.—This motion is made by the plaintiffs for an order and injunction restraining the defendants from interfering with or trespassing upon the line of railway of the plaintiffs between the River Ste. Marie on the west, and Spanish River on the east, and to compel the defendants to remove all rails and obstructions placed on the line of railway of the plaintiffs, as located between the said points.

As I understood counsel for the plaintiffs on the argument of the motion, all that is asked at present is; that matters should remain in *statu quo* until the trial of the action, that is to say, an affirmative order for the removal of rails and obstacles is not now insisted upon, the plaintiffs being willing that this part of the relief that they ask should stand over till the trial of the action.

As to whether or not there should be the order for the injunction restraining the defendants from further interfering with or trespassing upon the line of railway in question there was much and prolonged argument upon the law, and a very considerable volume of evidence, the witnesses who made affidavits for and against the motion having been apparently very rigidly cross-examined upon their respective affidavits.

The plaintiffs were incorporated by the Ontario Act 44 Vic. ch. 68 (O.). The second section of the Act gave them full power and authority to lay out, construct, and complete a double or single iron or steel railway from a point at or near Gravenhurst, in the District of Muskoka, or at such other point as the directors might determine; thence extending northerly to French River, thence extending westerly and northerly, or in such way as the directors might determine, to Sault Ste Marie, and to some point on Lake Superior near Sault Ste. Marie, in the District of Algoma; with power to build extensions southerly to connect with the railway system of Ontario, in such manner as the directors might determine, and with power to build the railway in sections as the directors might determine; with further power to build branches to Lake Nipissing and Lake Temiscaming, to which all the plaintiffs powers should be applicable.

The fourth section of the Act provided that the plaintiff's capital stock should be two millions of dollars, with power to increase the same as provided in the Railway Act of Ontario, that the money should be applied in the first place to the payment of fees, expenses, &c., of and incidental to the passing of the Act and organizing the company, and for making surveys, plans, and estimates, and the procuring of any plans or estimates theretofore made, and that all the remainder of the moneys should be applied in the making, equipping, completing, and maintaining of the railway, and to the other purposes of the Act.

The ninth section provided that as soon as shares to the amount of two hundred and fifty thousand dollars of the capital stock were subscribed and allotted, and the sum of twenty-five thousand dollars paid thereon, the provisional directors should call a meeting of the shareholders for the purpose of electing directors, &c.

The twenty-second section enacted that all the provisions of the Railway Act of Ontario, except as varied by this Act (the Special Act) should apply to the plaintiff company and the twenty-third and last section provided that the

railway should be commenced within three years, and completed within six years after the passing of the Act.

The Act was assented to on the 4th day of March, 1881.

The \$250,000 of stock was subscribed and allotted, and a call of ten per cent. paid thereon. Another call of five per cent. was made which was also paid. It was stated that a portion of these moneys was paid by the Grand Trunk Railway Co., and on the argument it was stated and admitted that the Grand Trunk Railway Co. had what was called "control" of the stock, and were largely, if not chiefly, interested in these proceedings.

During the years 1881 and 1882 the plaintiffs surveyed and located their line of road from a point on the Ste. Marie River, about two miles west of the town of Sault Ste. Marie to the Spanish River, a distance of 130 miles or thereabouts. The whole length of the plaintiff's contemplated railway was said to be about 370 miles. In Mr. Wragge's affidavit he says that the line of the plaintiffs has actually been staked out and partially cleared as far east as the village of Algoma Mills, a distance of about 98 miles, and from Algoma Mills to Spanish River, a distance of 25 miles, has also been partially graded.

This general statement, though I think it literally true, does not perhaps convey accurately to the mind the true idea as to the amount of work done.

By the cross-examination of Mr. Bailey it appears that the whole line was located from Sault Ste. Marie to Spanish River, and in 1881 and 1882 that some chopping was done west of Algoma Mills, that some work said to be of the character of "construction" was done at or near Algoma Mills, such as blasting rocks and the like, and some grading done by Carol, a contractor. He also speaks of the line being chopped out a little at Sault Ste. Marie, and of taking soundings for the bridge at that place.

A good deal of evidence was given as to the extent of the work done by the plaintiffs in 1881 and 1882 upon the line, but counsel did not appear to disagree to any great extent as to the amount of it.



It appears that the account for what it was said was construction (considered apart from surveys, soundings at the Sault, &c.,) was \$10,895. Mr. Bailey says, however, that he got a check for \$12,000 on this account.

From all the evidence I think it appears that the plaintiffs did in 1881 and 1882 survey and locate their line from Spanish River to Sault Ste. Marie, that at a place on this line between Spanish River and Algoma Mills, three-quarters of a mile of the road was graded by them: that some chopping and slashing was done by them on the line westerly of Algoma Mills, which was necessary to or preliminary to the grading of the road: that some work by way of blasting rocks and preparing the road was done at Algoma Mills or near that place: that in 1883 some work was done by way of chopping out the line between Sault Ste. Marie and the Ste. Marie River: and that some soundings for the purposes of the bridge at the Sault were made. It is contended, however, that these soundings were no part of the work upon the plaintiffs' line, for there was a charter to another company for the construction of the bridge.

It is, I think, beyond doubt on the evidence that, inclusive of the cost of surveying, the plaintiffs expended the sum of \$47,000 or thereabouts upon their line of road. Excepting the little that was done at or near Sault Ste. Marie in May, 1883, the plaintiffs did nothing by way of construction from 1882 till 1886, and it was contended by the defendants that they (the plaintiffs) had not made a *bonâ fide* commencement of the work within the period prescribed by their charter. The six years mentioned in the charter as the time within which the plaintiffs were to complete their railway expired on the 4th day of March inst. (that is, the six years after the passing of the Act expired precisely on that day), and on this ground it was contended that the rights and powers of the plaintiffs had come to an end. This action was, however, commenced on the 21st day of December, 1886.

In 1881 the defendants commenced constructing a branch of their railway from Sudbury Junction, and in 1884 it was completed to Algoma Mills, but it has not been much used. It seems pretty clear that from 1884 to 1886 it was used very little indeed, and I think a part of the time it was not used at all. It was said by the plaintiffs that the object the defendants had in building this piece of road was to connect at Algoma Mills with a line of vessels on the waters of the lakes; that having obtained the Toronto, Grey, and Bruce Railway the defendants were enabled to connect with such a line of vessels at Owen Sound which they preferred, and that for this reason the road from Sudbury to Algoma Mills was not used.

Mr. Van Horne, in his affidavit, says that since his appointment as defendants' general manager it has always been the intention of the defendants to build a branch to Sault Ste. Marie, and to construct, or to assist in constructing, the bridge over the Ste. Marie River. He says it was the intention to use the harbor at Algoma Mills as a starting point of a line of steamers to Port Arthur, especially pending the construction on the north shore of Lake Superior, and that, shortly before the completion of the Algoma Branch, the defendants found opportunity of acquiring the Toronto, Grey, and Bruce Railway, and thereupon adopted Owen Sound as a starting point of the steamers, being able from that point to do their general business equally well and their Ontario business better than from Algoma Mills.

He says the defendants have kept in communication with the United States Railway Companies approaching Sault Ste. Marie, intending to complete the branch by the time the first United States railway should reach that point. And that in the spring of last year, finding that good progress had been made with railways west of the Sault, the defendants determined to complete as early as practicable the branch and bridge, and passed a resolution to that effect early in June, 1886.

The defendants, in addition to many other contentions, contend that the plaintiffs had abandoned their line and the intention of constructing the road till they learned that they, the defendants, were about to construct a branch to the Sault.

On this subject, the affidavit of Mr. Hickson, the president of the plaintiffs' company, seems to be very clear and distinct. He says it was never the intention of the plaintiffs to abandon their charter or their line of railway to Sault Ste. Marie, that it was intended that the line should be constructed and used as a connection between the Grand Trunk Railway Company's system of lines and the American system of railways; that negotiations were carried on at various times with the Northern Pacific Railway Company and others, looking to the making of arrangements for the construction of the connection between the American and Canadian systems of lines at the Sault Ste. Marie, and that the work of surveying and locating the plaintiffs' line was carried on with the *bond fide* intention of building and constructing the road without reference to the operations of the defendants. He says that after the plaintiffs' line had been located between Spanish River and Sault Ste. Marie a season of depression in regard to railway enterprise set in, during which it was impracticable to make the necessary financial arrangements for the extension either of the American or Canadian systems of lines towards Sault Ste. Marie; and although negotiations had been carried on from time to time it was only within the year 1886 that American capitalists were found ready to supply the necessary funds for the extension of the American system of lines to Sault Ste. Marie, and there was a probability, if the plaintiffs' line was constructed, of a connection being secured with American roads at that point, and that it was when this state of things was brought about, that the plaintiffs entered into active measures for securing the construction of their line, and without any reference whatever to what was contemplated or proposed to be done by the defend-

ants. He further says that without any connecting railways on the American side at Sault Ste. Marie it would have been useless to have constructed the plaintiffs' railway to that point, as there would not have been sufficient traffic for it. He says that railways are being constructed in the United States towards the Sault Ste. Marie with which the plaintiffs' railway can make satisfactory and profitable connections, and that they are now endeavoring to perfect the necessary financial arrangements for the construction of their railway. There is a great deal of evidence bearing directly or indirectly upon this part of the contention, and I think it a fair conclusion from it that both the plaintiffs and defendants were aware that a road constructed to Sault Ste. Marie would not be at all a paying concern, unless American railways were also constructed to the same place on the American side, and that neither one nor the other was desirous of undergoing the probable and almost certain loss that would arise by the construction and running of a road to Sault Ste. Marie before such event should take place. I think it appears that there was such a season of depression in railway enterprise as that spoken of by Mr. Hickson, and that a change in this respect took place in 1886; that communications had been going on between the plaintiffs and American railway people regarding the plaintiffs' line and the bridge across the river, the charter for the construction of which was controlled, I believe, by Mr. Hickson, and that the defendants were more or less aware of these communications, the particulars of which would be quite too voluminous to be stated here. I think that when this change took place both the plaintiffs and the defendants became desirous of constructing and completing a road to Sault Ste. Marie, and that in this simple way the foundation of this conflict has its existence. The defendants say that the plaintiffs have not and cannot obtain sufficient capital to carry out the gigantic work of constructing 370 miles of railway, but with this I do not think I am at present concerned. If the plaintiffs have rights in regard



to the matter in dispute they should not lose them for this alleged reason, at least until it is ascertained that they are unable to construct the road: besides, the manner in which capital for the construction of railways is sometimes, if not frequently, obtained, when the lines happen to be favourable ones, is such that it would not be a matter of great surprise to learn within a short time that the necessary capital is forthcoming, even if what was said in argument by the defendants as above has at present some foundation in fact.

No question was raised as to the authority of the defendants to construct a line of railway to the Sault Ste. Marie. The plaintiffs however, object to the defendants taking the line of road located by them (the plaintiffs). And I may here say that in my opinion the evidence shows that the defendants are so locating their line of road, or have so located it, as to prevent the use by the plaintiffs (or any others) of the line of road surveyed and laid out by the plaintiffs. I do not think that I need say more upon this immediate subject. It seems quite plain on the evidence.

The defendants virtually say that the plaintiffs have no right whatever to the line that they (the plaintiffs) surveyed and laid out. They do not say that the plaintiffs did not in fact locate the line. The defendants' own witnesses say that their surveyors were able to "pick up" the plaintiff's line, and they do not show that there was any difficulty in so doing. The plaintiffs' plans from Spanish River to Sault Ste. Marie were filed, a part of them on the 29th of September, 1881, and a part on the 5th October, 1881. The defendants' plans from Sudbury to Algoma Mills were filed in 1882, and from Algoma Mills to Sault Ste. Marie on the 29th and 31st December, 1886, shortly after the commencement of this action. The plaintiffs' line has not been located nor the plans respecting it filed from Spanish River eastward, and as I understand counsel, the plaintiffs have not yet absolutely decided as to the point that shall be the easterly terminus of their line.

The defence contends that the plaintiffs did not commence the work within the three years within the meaning of the Acts. First, because there was not a *bonâ fide* commencement at all by the plaintiffs. As to this matter it is undeniable that the plaintiffs did, in fact, make a commencement, and if having stopped when they did, they had within the three years gone on with the work it would I think, scarcely be doubted what they did would be considered their commencement. I am unable, on the evidence before me, to arrive at the conclusion that it has been shewn that what the plaintiffs did, as they say by way of commencement, was done by them in bad faith. It is said that the plaintiffs had not then sufficient capital to prosecute the work. It may be answered that they were relying upon expectations which were disappointed by reason of the depression in railway enterprise before referred to. If there had not been such a depression and, in say the year 1883, American railways were being constructed or even about being constructed to the Sault Ste. Marie, as it is said is now about being done, the circumstances of the plaintiffs might have been, and I am led to think would have been materially different in respect to their road, and the prospect of raising, and the raising of the capital necessary for its construction and completion. That depression was, so far as I have been informed, unforeseen and the plaintiffs not then further prosecuting the work may, I think, more reasonably be attributed to disappointment than to bad faith in making the beginning they did, and in so doing expending the comparatively small, but in fact large sum of \$47,000, ten or twelve thousand dollars of which was expended in what both parties say was without doubt matters of "construction" of the road, apart from expense of surveys, plans, &c., &c.

It was secondly objected that before doing this work the plaintiffs had not filed their plans of the whole line of railway. The plans, as before stated, of the line at the place where the work was done, and all the way from Spanish River to Sault Ste. Marie were filed, though not in respect

of the longer line East of Spanish River. The plaintiffs were authorized to construct the road in sections, and seeing the difference of opinion amongst the learned Judges in *Re The Stratford and Huron R. W. Co., and The Corporation of the County of Perth*, 38 U. C. R. 112, I think I should not, on a motion of this character, defeat the plaintiffs on this ground.

The defence also contended that the plaintiffs were obliged to expend ten per centum of the capital within the three years, according to the provisions contained in sub-sec. 5, of sec. 36, of the general Act, R. S. O., ch. 165. The plaintiffs answered by saying that this sub-section has no application. The defendants invoked the force of sec. 4 of the general Act to show that sub-sec. 5, of sec. 36, must apply. The provisions of sec. 4 have regard to the application of the general Act, that is the subject of the section so far as it can have any bearing here. Section 22 of the special Act is in regard to the same subject. The rule laid down by Lord Westbury in the case of *Ex p. The Vicar and Church Wardens of St. Sepulchres, In re The Westminster Bridge Act, 1859*, 33 L.J. Ch. at p. 376, is this: "If the particular Act gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject matter of the rule out of the Land Clauses Act." This rule is referred to and acted upon by Keating, J., in *London, &c., R. W. Co. v. Wandsworth Board of Works*, L. R. 8 C. P., at 189. By applying the rule here it seems to me that sec. 22, giving, as I think it does, a complete rule on the subject, the provisions of sec. 4 of the general Act do not apply to the case, and the argument so far as it rested upon the words in the first line of it, "Where not otherwise expressed," and "unless they are expressly varied or excepted," subsequently occurring in the section cannot have any force. I think that sec. 4 of the general Act should be left out of the case. One is then left to consider and deal with sec. 23 of the special Act, and sub-sec. 5, of sec. 36, of the general Act.

In *Maxwell's Interpretation of Statutes*, at p. 221, it is said, that where a general Act is incorporated into a special one the provisions of the latter will prevail over any of the former with which they are inconsistent. In *Attorney-General v. Great Eastern R. W. Co.*, L. R. 7 Ch., at 482. Sir George Mellish says: "For if we find something expressly different in the Acts, that which is in the special Act must overrule that which is in the general Act. And this, so far as I know, is the universal rule."

Lord Westbury, in the case in 33 L. J. Ch., before referred to, after stating the rule to be applied where the particular Act gives the complete rule on the subject, says: "But suppose the rule given by the particular Act applies only to a portion of the subject, does that interfere with the rule of the Lands Clauses Act being incorporated as to the other and separate part of the same subject?"

His Lordship then dealt with the case before him, holding that as there were separate and distinct parts of the same subject, there being distinct bills of costs, both provided for by the general Act, and only one by the special Act, the general Act applied as to one part.

In the case in L. R. 7 Ch., Sir George Mellish spoke of the probable intent of the Legislature as being important in considering a matter of this character. In the present case, one finds in the 23rd section of the special Act a complete rule or provision as to the commencement and completion of the railway.

In sub-sec. 5, of sec. 36, of the general Act, there is found a complete rule or provision upon the same subject, but this embodies two additional things, the one being the expenditure of the ten per cent. within the three years, the other, the consequences of default by the Company.

The provision in the special Act shortens the time for the completion of the railway from ten to six years. It is I think, exceedingly difficult to read sec. 23, and this sub-sec. 5 together. Suppose this to be done or attempted, and the ten per cent. to have been expended within the three years, (and it is contended that it was), at what time would



the corporate existence and powers of the Company cease? At the expiration of six years, or at the expiration of ten years from the passing of the special Act? When ten years are given for the completion of the road, there is more apparent reason for requiring that a fixed proportion of the capital should be expended at the expiration of three years, or other limited time, than in a case where the road is to be completed in the shorter period of six years, at least so it appears to me. Then why was not the ten per cent. mentioned in conjunction with the commencement in three years, if it was not deliberately intended to leave it out?

Section 22 of the special Act does not require that provisions of the general Act should be expressly varied as was contended for on the hypothesis that section 4 of the general Act applied, and one is at liberty to inquire as to the intention of the Legislature in passing and enacting section 23 of the special Act.

Was the intention that the provisions should be less favorable to the Company than if the special Act contained no such provision? Is there anything elsewhere to show or indicate that the plaintiffs were or are a company to whom the Legislature intended to give, in this respect, less than is ordinarily given to Railway Companies, less than is mentioned in the general Act? I have found nothing of the sort. I was not referred to any such thing.

As to the true and proper conclusion on this subject, I am willing to say that I am not free from doubt; but I strongly incline to the opinion that the intention was, that section 23 of the special Act should be substituted for sub-sec. 5, of sec. 36, of the general Act, and that in this way the provision of the general Act is varied within the meaning of section 22 of the special Act, so as to exclude sub-sec. 5, of sec. 36, of the general Act. On the argument, counsel for the defence admitted (and I think quite correctly) that if this is the proper view to take of the enactments, he could not contend that the cor-

porate powers, or the corporate existence of the plaintiffs' company were gone, or that their corporate existence could be collaterally called in question. See *Morawetz on Private Corporations*, 2nd ed., sec. 1006 and note, and sec. 1015.

As to the alleged abandonment by plaintiffs, I am of opinion that the evidence does not prove it. I think that, on the contrary, the evidence shows that there was no intention on part of the plaintiffs to abandon their road, and I think it appears from the evidence it was known to the defendants that the plaintiffs had no intention to abandon. It is true that many of the questions asked on this subject were answered in a manner that for want of a better expression, may be said to be by way of avoidance; but I glean from the whole that there was knowledge on the part of the defendants' principal officers that the plaintiffs did not at all intend to abandon their project, and I have before referred to what I think appears to have been the cause of the delay, and that cause seems to me to have been one that had an effect upon the conduct of both parties to the litigation.

As to the estoppel contended for by defendants, I am of the opinion that it does not exist. The dismissal of the action for want of prosecution and the bringing by the plaintiffs in that action of a subsequent action for the same cause is a thing that often occurs and is well known to the Courts. It is not pretended that the dismissal of the former action was a dismissal on the merits. There is, I think, no estoppel by conduct. It is not, I think, a case in which the defendants have gone on under a mistake of title, or rights, to the knowledge of the plaintiffs who, with knowledge, made no objection. This at least is so as to the matters in respect of which the order and injunction are now asked. There is shewn in respect to this no element of fraud on the part of the plaintiffs, and I think it appears that the defendants were not in ignorance as to the intention of the plaintiffs. As I have already said, I am of the opinion that the corporate powers and existence of the plaintiffs cannot be collater-

ally attacked with success—if the view I incline to take of the Act is the correct one. The six years from the passing of the special Act had not expired when the acts of the defendants now complained of were done by the defendants and when this action was brought. It has been held by a Court in the State of Iowa, and I cannot but think rightly held, that one railroad company cannot by purchasing land and proceeding to lay its track thereon debar from the same land another company which had previously surveyed and staked out there a line of its own: *Sioux City and D. M. R. W. Co. v. Chicago, M. and St. P. R. W. Co.*, 27 Fed. Rep. 770.

The survey and location of a railway is a part of the work of construction: *The C. R. I. & P. R. Co. v. Grinnell*, 51 Iowa 476.

When a railroad company has ascertained and located where its road shall be, it is not competent for another company to step in and take its route, agree with the owners and occupy the lands: *The Titusville and Petroleum Centre R. W. Co. v. The Warren and Venango R. W. Co.*, 12 Phila. 642. And there seem to be many decisions in the United States Courts to the like effect as these.

In the present case the defendants, by their own evidence, show that two lines of road could easily have been taken and a road constructed upon each, and that the additional expense of constructing a road upon a line alongside of the line located by the plaintiffs as compared with the expense of the line they are constructing would not have been very great. One does not easily perceive why they did not adopt such a line, for they, according to their own witnesses or some of them, foresaw, or at least expected and thought that they should, by adopting the course they did adopt, have trouble with the plaintiffs.

The plaintiffs are applying to the Provincial Legislature for an Act to extend their charter, that is, as I understand, to extend the time for the completion of the railway. The notice in this respect was given as early as October last. One cannot read the statutes without seeing that applica-

tions of this nature have been of frequent occurrence in years past. The defendants, as counsel said, are intending to oppose the passing of such an Act in this instance, and to rely upon, amongst other things, the provisions of the Act 46 Vic., cap. 24, sec. 6 (D.). It is possibly expected that I will offer an opinion on this subject, but I think I should modestly decline to do so. I do not think I should in this case be asked for an opinion in advance as to the Legislative powers of the Provincial Parliament, or that I should, in any case, offer such an opinion especially when it appears that an application on the subject is pending before the Parliament. There might possibly be a case of absolute necessity in which a Judge might be compelled to do so; I do not say there could not be such a case; the necessity, however, does not, I think, exist in this case, and I cannot readily conceive one in which it would exist.

I do not see any necessity for my referring to the applications that have been made by the plaintiffs, or defendants, respectively, to the respective governments, regarding the acquiring of lands for the road or to what has been said regarding expropriation of lands.

The plaintiff's application to this Court is in its nature and kind one for the protection of an alleged legal right. It is not required that they should make out a clear legal title, but only to satisfy the Court that there is a fair question to raise as to the existence of the legal right. I think the plaintiff shows this much. It is beyond reasonable doubt that if the plaintiffs have such right, it has been encroached upon by the defendants, and that the defendants intend further encroaching upon it if not prevented from so doing—perhaps to the extent of its total destruction.

I am not unaware that the case presents difficult questions of law, questions to my mind so difficult that some of them may fairly be considered doubtful questions, and perhaps this is an additional reason why the plaintiffs should be relieved in the meantime and until such questions can be determined in the ordinary manner.



I am of the opinion upon the whole case presented, that the order and injunction asked for should be granted.

I think the plaintiffs should be placed upon terms to bring the action on for trial at the earliest period reasonably possible, the defendants aiding, or, at all events, not hindering them in this respect.

G. A. B.

---

[CHANCERY DIVISION.]

MOOERS ET AL. V. GOODERHAM & WORTS [LIMITED].

*Contract—Sale of goods—Implied warranty that goods shall be in merchantable condition—Inspection—Caveat emptor—Damages.*

Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description.

On a sale of goods when the buyer has no opportunity of inspection, the maxim *caveat emptor* does not apply.

The plaintiffs sold a cargo of rye to the defendants to be shipped from K. and delivered afloat at the defendants' dock at T. On being unloaded at T. into the defendants' elevator, it was discovered by the defendants' inspector that the bottom of the cargo was heated; and subsequently the whole of it became heated. There was no opportunity to inspect the rye at the time of the making of the contract, nor did the defendants waive inspection. There was no express warranty as to quality or condition.

*Held*, that there was an implied warranty on the part of the plaintiffs that the commodity delivered would be saleable or merchantable under the description "rye," that there was a breach of such warranty, and that the maxim *caveat emptor* did not apply.

*Jones v. Just*, L. R. 3 Q. B. 197, cited and followed; *Borthwick v. Young*, 12 A. R. 671, distinguished.

The breach of warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract, and it forms no defence to an action by the seller for the price, but the purchaser, on being sued for the price, is allowed to give evidence of the breach of warranty in reduction of damages.

THIS was an action brought by Messrs. H. Mooers & Co. against Gooderham & Worts (Limited) for the price of a cargo of rye.

The defendants set up as a defence that the rye was not sound and merchantable, and filed a counterclaim for dam-

ages on the purchase of a previous cargo which was also unsound, but which fact was not discovered until after it was paid for.

The action was tried at the Spring Sittings held in Kingston on May 19th, 1887, before Ferguson, J.

The evidence shewed that the bargain was made by letters and telegrams, and that no grade or standard was mentioned, but a mere sale and purchase of "rye" at a certain price per bushel: that the rye was to be delivered afloat at defendants' dock in Toronto: that the first cargo was sent to them by the vessel *Elgin*, and was unloaded into the defendants' elevator, but in the unloading it was discovered that the bottom of the cargo was damaged by heating, and after the grain was put in the elevator the whole of it heated. A second cargo, which had been purchased prior to the defendants ascertaining that anything was wrong with the first, was shipped in a vessel or barge called the *Scotia*, and was discovered to have been damaged in a similar manner: the price of the first cargo was paid by the defendants before they discovered the subsequent heating in the elevator.

*Walkem, Q. C., and J. B. Walkem.* There was an acceptance of the grain by the defendants, and after the acceptance it was too late for them to say it was not sound. The facts show a simple sale of the grain without any warranty: *Borthwick v. Young*, 12 A. R. 671. The *Scotia's* cargo was inspected when loading, and was sent in good faith. The maxim *caveat emptor* applies. In the absence of fraud there is no implied warranty either as to the quality, character, or condition of the chattel: *Benjamin* on Sales, 3rd Am. ed., secs. 644, 647, and 651, note u. A warranty does not extend to defects apparent on simple inspection: *Benjamin* on Sales, sec. 616, note e. See, also, secs. 656, 657, 658, 661, note U. When there is no opportunity to inspect, *caveat emptor* does not apply; but here there was an

opportunity when the vessels arrived. Where there is no fraud, though the defect is latent, if there is an opportunity to inspect *caveat emptor* applies. Sec. 657, quoting Mellor, J. The buyer here did not rely on the superior knowledge of the seller.

*T. P. Galt* and *T. G. Blackstock*, for the defendants. The contract was for a cargo of rye, and the defendants were entitled to have a sound and merchantable article delivered: *Jones v. Just*, L. R. 3 Q. B. 197; *Randall v. Newson*, 2 Q. B. D. 109. The maxim *caveat emptor* does not apply, because, at the time the contract was made there was no opportunity to inspect, and the case of *Borthwick v. Young*, 12 A. R. 671, has no application: *Benjamin* on Sales, 3rd ed. 649; *Gardiner v. Gray*, 4 Camp. 145. If it were held that the purchaser was precluded from claiming damages in respect of a breach of warranty in every case where he had an opportunity to inspect when the goods were delivered, it would be equivalent to saying that in all cases of executory contracts the right to reject was the only right that a purchaser had; and if he once accepted the articles sold he could never recover in respect of a breach of warranty, no matter how inferior the goods delivered were to those he had a right to receive under his contract. There was no acceptance of the second cargo, and the defendants had the right to reject it, a portion of the grain being unsound; and the defendants had done nothing to preclude their right of rejection, their unloading the grain not being an acceptance: *Heilbutt v. Hickson*, L. R. 7 C. P. 451. Even though the acts of the defendants amounted to an acceptance of the second cargo, still they have the right to give evidence of the breach of warranty in reduction of the price. We also refer to *McClure v. Kreuteziger*, 6 O. R. 480; *Couston v. Chapman*, L. R. 2 Sc. App. 250; *Grimoldby v. Wells*, L. R. 10 C. P. 391; *Dymont v. Thompson*, 12 A. R. 659; *Hedstrom v. Canada Car Co.*, 8 A. R. 631; *Towers v. Dominion Iron and Metal Co.*, 11 A. R. 323.

*Walkem*, Q. C., in reply. *Jones v. Just*, cited by my learned friends, does not apply. In that case the goods were on their voyage, and could not be inspected. There was an opportunity for inspection in this case at Toronto. The defendants did inspect, and decided to accept the rye, and after that they cannot allege that the article delivered was not rye. The whole transaction amounts to a present sale at time of the acceptance. The acceptance shows performance of all conditions precedent if defendants rely on any such ground. There is no defined standard, and defendants should have stipulated for what they wanted. I refer to *Couston v. Chapman*, L. R. 2 Sc. App. 250 ; *Benjamin* on Sales, 3rd Am. ed. sec. 646, citing *Barr v. Gibson*, 3 M. & W. 390.

June 13, 1887. FERGUSON, J.—The plaintiffs are dealers in grain, residing and carrying on their business in Kingston. The defendants carry on their business in Toronto. The plaintiffs bring this action to recover the price of a cargo of rye sold by them to the defendants, claiming a balance (after payment by the defendants of a small sum for freight) of \$5272.97.

The defendants set up a warranty that the rye would have to be sound and merchantable, &c., and a breach of this warranty : also saying, in case any act of theirs could be so construed into an acceptance of the rye, that the same was not sound and merchantable at the time it was delivered to them ; but, on the contrary thereof, was heated and musty and worthless.

There was no dispute, nor could there be, as to what in fact were the terms of the contract of sale, as these terms were clearly expressed in the correspondence. There was, however, much contention as to the legal position of the parties under the contract, that is to say, as to what were the legal rights and liabilities under the contract.

It was conceded that there was no express warranty. That there was simply a sale of a cargo of rye of about 10,000 bushels, afloat at defendants' dock in Toronto. The



rye was to be sent from Kingston. It was either at Kingston at the time of the contract, or was afterwards procured by the plaintiffs at Kingston and shipped to the defendants at Toronto by the vessel *Scotia*. The price was fifty-three cents per bushel.

The chief contentions were as to whether or not there was a warranty implied; and if so, as to whether or not there had been a breach of such warranty. The plaintiffs contended that there had been an opportunity for inspection of the rye; that it had been inspected by the defendants at Toronto before being unloaded from the vessel, and that the maxim *caveat emptor* applied.

The defendants contended that as there was no opportunity for inspection of the rye at the time of the making of the contract, and as there was no waiver of an inspection, the maxim did not apply; and that the opportunity for inspection in Toronto before unloading the rye was immaterial, that being long after the completion of the contract of sale. As I understood the defendants' counsel he contended that the real question was performance or not by the plaintiffs of a complete contract of sale.

In the case *Jones v. Just*, L. R. 3 Q. B. 197, the Court seems to have taken much pains to lay down the law upon the subject of contracts of this kind with accuracy, and I do not see that anything laid down there is at variance with any of the authorities relied on by either of the parties in the present case.

In the present case it is, I think, clear that there was no opportunity to inspect the commodity at the time of the making of the contract. It is also clear, I think, that the defendants did not waive inspection. In these respects the case seems to me to be very different from the case of *Borthwick v. Young*, 12 A. R. 671, and I think the real question is, whether or not there was performance by the plaintiffs of a completed contract, the making of which took place long before the arrival of the rye in Toronto, there having been at the time the contract was made no inspection by the defendants, no opportunity for such inspection, and no waiver of inspection.

Then what was the contract? Did it contain a warranty by implication? and if so, what was the warranty? In *Jones v. Just*, above referred to, the Court, after reviewing and classifying the authorities up to the time of the decision, said, at p. 205: "It appears to us that, in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description." Quoting the words of Lord Ellenborough, in *Gardiner v. Gray*, 4 Camp. 145: "Without any particular warranty, this is an implied term in every such contract;" and I think the case *Jones v. Just* affords clear authority for saying that in the present case there was an implied promise on the part of the plaintiffs that the commodity delivered would be saleable or merchantable under the description "rye;" and I am of the opinion that the maxim *caveat emptor* does not apply, and is out of the case. This promise was nothing more or less than a warranty.

In the case *Jones v. Just*, manilla hemp that sold at auction, with all faults, for 75 per cent. of the price of good manilla hemp, which was nearly the equivalent of the invoice price of it, for hemp had risen in the market, was considered not merchantable hemp, that is, not saleable or merchantable under the description "manilla hemp."

In the present case I find, upon the evidence, that some of the rye contained in the cargo delivered was of good quality, but that a large part of it was not, and was rye that had been damaged or injured, and that the cargo, as a cargo of rye, was not merchantable under the description "rye," and that there was a breach of the warranty, contained by implication in the contract.

When the defendants commenced to unload the cargo they were under the impression that it was good rye. They had an inspector there to examine it. He found the upper part of the cargo good, but during the progress of the unloading it was ascertained, and I think this is placed beyond reasonable doubt, that a large quantity of the

cargo was not good, but was very seriously injured and damaged. It was contended that the defendants, when they made this discovery, should have stopped unloading; and their not having done so, but having gone on and taken into their custody, and keeping the whole cargo, was an acceptance of it, which operates to their disadvantage in this litigation.

I am not of this opinion. The breach of the warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract. So it forms no defence to an action by the seller for the price, but the purchaser, on being sued for the price, is allowed to give evidence of the breach of warranty in reduction of damages, and the price agreed on for the warranted article will be reduced by the difference between the price contracted for in consideration of the warranty and the real value. And on a sale of unascertained goods by description, if the goods supplied do not correspond with the description, the purchaser may refuse to receive them. The description is substantially warranted; and if the purchaser accept the goods, he may maintain an action for the breach of warranty or noncompliance with the description. And if, after having accepted the goods, he is sued for the price, though under the late practice he could not plead breach of warranty, he may, as in the case of breach of warranty on the sale of a specific chattel, give in evidence the noncompliance with the description and the consequent difference in value of the goods, in order to reduce the amount of the damages. The defendants in the present case have, in their statement of defence, alleged the facts on which they rely, and have given their evidence; and, my opinion being in their favour both on the law and in regard to the facts, they are, I think, entitled to a reduction in the price of this cargo of rye.

At the trial it was agreed that in the event of its being held that the defendants accepted this cargo, and that there was a breach of warranty, the damages—that is, the reduction in the price should be the difference between forty-three

cents per bushel and fifty-three cents per bushel—and that the freight paid on plaintiff's account should also be allowed. It was also said that the defendants would claim for storeage, and one cent per bushel for loading what was sent away, but I am not certain that my note of the argument is full and accurate. These smaller details may conveniently be put in proper condition on settling the judgment.

The defendants' counter-claim against the plaintiffs is for damages for alleged breach of warranty on the sale by the plaintiffs to them of another cargo of rye, delivered before the delivery of the cargo of which I have been speaking.

There was no material difference between the two contracts, except that in this instance the price was fifty-five cents per bushel. This cargo was received and unloaded by the defendants, and afterwards discovered, as they say, to be damaged rye. What they say is that when delivered to them it was not sound and merchantable, but on the contrary thereof was heated and musty, and not of a merchantable quality.

What I have said regarding the contract for the sale of the other cargo, and in respect of the warranty, may be applied and considered as repeated, so far as necessary, here. There was in this instance no opportunity for inspection at the time of the making of the contract nor a waiver of the right of inspection. The maxim, *caveat emptor*, does not apply. The legal question is the same as in the case of the other cargo. There was a warranty the same as in the case of the other cargo, and on the evidence I find that there was a breach of that warranty; that the rye delivered was not saleable or merchantable under the description "rye," but on the contrary was damaged and not so saleable or merchantable, and in this instance I think the evidence shows that it was all, or nearly all, so damaged. And I think the defendants might have maintained an action for the damages they now claim, and that they should succeed on their counter-claim. The evidence



shows that this cargo was sold at forty cents per bushel, the purchaser from the defendants intending it for shipping to Antwerp. There was not evidence showing that this was an improvident sale of it, or tending to shew this; and I apprehend the difference between this and the contract price will, in a general way, be the damages recoverable upon the counter-claim.

NOTE—The details of the judgment, and the matter of costs were, upon a subsequent, day and upon further argument, adjudicated upon.

G. A. B.

---

## [COMMON PLEAS DIVISION.]

## CLARKSON V. STERLING.

*Bankruptcy and insolvency—Evidence of insolvency—"Insolvent circumstances"—48 Vic. ch. 26 (O.)—Preference.*

On 19th December, 1885, a transfer of certain book debts was made by the firm of B. M. & Co., to defendant, under a contract therefor, made on the 16th August, 1884, whereby defendant lent the firm \$15,000, which was to be repaid on six months notice, and defendant to be employed as a clerk at \$2000 a year. The firm subsequently made an assignment, under 48 Vic. ch. 26 (O.), to the plaintiff, for the benefit of their creditors. The plaintiff claimed that at the time of the transfer the firm was insolvent, and therefore the transfer was invalid as giving, or having the effect of giving, the defendant a preference. At the time of the transfer the value of the firm's stock of goods at the ordinary selling value was nearly double the amount of the firm's liabilities; but when they were sold by the plaintiff, some two months afterwards, they only realized a third of the ordinary selling price, and much less than the liabilities.

*Held*, that the firm were not insolvent at the time of the transfer; and the transfer was therefore valid.

THIS was an action tried before Cameron, C. J., without a jury, at Toronto, at the Fall Assizes of 1886.

The learned Chief Justice reserved his decision, and afterwards delivered the following judgment:

CAMERON, C. J.—The plaintiff, as assignee of Messrs. Brayley, McClung & Co., under an assignment made by them for the benefit of their creditors generally, sought to set aside a transfer of certain book debts, bills, and notes, made by the firm to the defendant on the 19th of December, 1885, in pursuance of the terms of a contract entered into between the firm and the defendant on the 16th of August, 1884, whereby the defendant lent and advanced to the firm \$15,000, to be repaid at any time after the 15th of January, 1886, on six months' previous notice; the firm to pay interest in the meantime at the rate of ten per cent. per annum quarterly, and to employ the defendant as a clerk at the salary of \$2,000 a year.

The defendant duly gave the six months notice required by the terms of the agreement; and claimed also, in accordance with the agreement, a transfer of the debts, bills, and notes in question.

The plaintiff, representing the general creditors of the firm of Brayley, McClung & Co., contended the transfer was void as giving, or having the effect of giving, the defendant a preference over the other creditors of the firm; and that, at the time of the transfer, the firm was insolvent and unable to pay its debts in full.

The total liabilities of the firm at the time of the assignment, including the claim of the defendant, after deducting the value of the debts, notes, and bills transferred to him, amounted to \$49,661.99, and the stock in trade, estimated at the ordinary selling prices, was valued at \$91,728.72.

The other assets amounted to \$2,219.99, making the aggregate of assets \$93,948.71, or a surplus of \$44,286.72. The stock of goods, when sold by the assignee, en bloc, only realized about thirty per cent. of the selling price, or about \$27,318.

The plaintiff put in the examination of the defendant under the Administration of Justice Act, from which it appeared the defendant entered the employment of the firm as accountant and financial manager in August, 1884, and so continued up to the time of the assignment, on the 11th February, 1886. The defendant was thus in a position to know the financial condition of the firm; and he was aware of its failure to meet its engagements, to him at all events, as he swore he had several times asked for payment, and, though he could not say what their exact answer was, he admitted it amounted in effect to a statement that they could not pay. This, and the sale of the stock at thirty cents on the dollar, was the evidence relied on by the plaintiff to establish the insolvency of the firm at the time the transfer now questioned was made to the defendant.

There was no question that the firm was indebted to the defendant, or as to the actual *bona fides* of the transaction, which is impeached solely on the ground that it constitutes a preference of the defendant over other creditors, contrary to the spirit and intention of the Act 48 Vic. ch. 26, secs. 2, 3, (O.)

If, instead of delivering bills and notes to the defendant, Messrs. Brayley, McClung & Co. had paid him in money, the payment would have been protected under the Act; but a satisfaction of the debt due to the defendant, otherwise than by a money payment, would not seem to come within the protection of sec. 3 of the Act, if, at the time

of the satisfaction, the debtor was insolvent: *River Stave Co. v. Sill*, 12 O. R. 557.

It would seem, then, only on the ground that Messrs. Brayley, McClung & Co. were not insolvent and not unable to pay their debts in full can the defendant's right to the debts, bills, and notes transferred to him be upheld.

If I must decide the case upon the result of the sale of the stock-in-trade of the debtors there is no question that they were insolvent; but treating their business as a going one at the time the transfer was made, having regard to the then fair value of the stock as the stock of a going concern, I am unable to say that the firm was insolvent. The value of the goods, taken at the price at which they would have been sold by a wholesale dealer to a retail dealer, or at the price at which the firm purchased them with freight and duties added, would have been greatly in excess of the liabilities of the debtors; and I am unable to say that because the goods brought less than the liabilities at a forced sale some two months later, the firm was not in a condition to make a valid transfer of its customers' obligations to meet the terms of a contract entered into by them before the passing of the 48 Vic. ch. 26, (O.)

I do not mean that because the contract was entered into before the passing of that Act, that the Act does not apply; but where the *bona fides* of the transaction is not disputed, I think it incumbent on the creditors impeaching it to prove beyond speculation or conjecture that the condition of things existed that invalidates it. In other words, the burden of proving that condition rests upon the plaintiff; and it was not sufficient to shew that a stock of goods, the value of which at the ordinary selling price was double the amount of the firm's liability, was sold two months afterwards for less than a third of the selling value, and considerably less than the amount of the firm's indebtedness, to constitute insolvency.

I must therefore dismiss the plaintiff's action, with costs.

In Michaelmas Sittings, *MacLennan*, Q. C., moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

During Easter Sittings, May 26, 1887, *MacLennan*, Q. C., supported the motion, and referred to *Rae v. McDonald*, 13 O. R. 352.

*George Kerr, Jr., and Duggan, contra.*



May 26, 1887. ROSE, J.—I concur in the opinion expressed by the other members of the Court, that we cannot interfere with the finding of the learned Chief Justice.

Whether or not Brayley, McClung & Co. were insolvent was a question of fact.

That they were compelled to suspend payment was only a piece of evidence, not at all necessarily conclusive.

I endeavoured, in *Rae v. McDonald*, 13 O. R. 352, to point out the difference between “legal insolvency” and “commercial insolvency.” I think the Act 48 Vic. ch. 26, (O.), refers to legal insolvency.

Upon further consideration since *Rae v. McDonald*, I am unable to apprehend any distinction between the financial condition of a man “in insolvent circumstances” and one “unable to pay his debts in full;” and it would seem reasonably clear that the “insolvency” referred to in the following line of the statute, in the words “knows that he is on the eve of insolvency,” means no more than “insolvent circumstances.”

While I do not desire to depart from the definition given in *Rae v. McDonald* of legal insolvency—*i. e.*, a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process—I would desire to add that such sale must be fair and reasonable. What would be fair and reasonable must be determined on the facts of each case.

Property worth to-day double a man's liabilities, and which to-morrow may, for temporary causes, be quite unsaleable, but which, if kept for a short time and judiciously handled, could be sold for more than sufficient to pay all the liabilities, should not, it seems to me, be valued at the price realized by a forced sale under the temporary disadvantages.

I do not attempt to lay down any rule for general application. If any rule is to be formulated it must be after much experience and consideration in working out the provisions of the Act in question.

Mr. MacLennan urged that the sale in question was one under legal process. Assume it to have been so, can we say that a sale, under the conditions detailed in the evidence, two months after the transfer which is attacked, necessarily determined the value of the goods sold, and prevented the learned Chief Justice finding that their value was more fairly ascertainable by reference to their cost and selling price ?

If so, then apply the test at the date of the purchase of the new goods at the formation of the partnership.

The capital composed of the joint stocks was stated at \$52,000 ; the purchase was, say \$60,000—total \$112,000.

If that stock had been sold *en bloc* at the same price that the stock was sold at by the plaintiff, viz., 30 per cent.; it would have realized \$33,600—\$26,400 less than the new stock cost ; and, assuming that the firm bought the new goods on credit, it would have been hopelessly insolvent from the first.

If the Act is to be so construed, it is to be feared that most of the commercial houses in this country may be insolvent.

I certainly am not so sure that the fair value of the goods did not exceed the liabilities as to enable me to say that the learned Chief Justice erred in his conclusion of fact.

If the prices put upon the goods by the assignee represented the nominal and not the fair or real value, it is, perhaps, to be regretted that such valuation has afforded evidence that cannot be disregarded in determining the question of insolvency.

The motion must be dismissed, with costs.

CAMERON, C. J., adhered to his judgment delivered at the trial.

GALT, J., concurred.

*Motion dismissed.*

## [COMMON PLEAS DIVISION.]

## THE DOMINION BANK V. COWAN.

*Bankruptcy and insolvency—Evidence of insolvency—"Unable to pay debts in full" and "insolvent circumstances," Meaning of—Assets under mortgage or warehouse receipts, effect of.*

Under a judgment recovered and execution issued thereon in February, 1887, certain goods and chattels of C. were seized. These goods were covered by a chattel mortgage made on 18th December, 1886, in favour of the defendant. The evidence shewed that at the time of the mortgage there was a surplus of about \$13,000 of assets over liabilities. All the assets were either mortgaged or under warehouse receipts.

*Held*, that C. could not be deemed to be insolvent at the time of the making of the mortgage within 48 Vic. ch. 26, (O.)

There is no wider meaning to be given to the words "unable to pay his debts in full" than to "insolvent circumstances"; but both expressions refer to the same financial condition, that is, to a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted.

The fact that all the assets were either mortgaged or under warehouse receipts is not alone sufficient to render a debtor insolvent.

THIS was an interpleader issue tried before Rose, J, without a jury, at Cobourg, at the Spring Assizes of 1887.

The facts were as follows :

The Dominion Bank recovered a judgment against Louis J. Coryell, and issued an execution in February, 1887, under which, in March following, certain goods and chattels in the possession of the execution debtor were seized, but which were covered by a chattel mortgage, bearing date 18th December, 1886, made by Coryell in favor of the defendant Frederick William Cowan.

The question was, whether the execution debtor was, at the time of the making of the mortgage, in insolvent circumstances, and unable to pay his debts in full within 48 Vic. ch. 26 (O):

The value of the assets and liabilities is set out in the judgment.

*McGee*, for the plaintiffs.

*G. T. Blackstock*, for the defendant.

The learned Judge reserved his decision and afterwards delivered the following judgment :

May 27, 1887. ROSE, J.—At the close of the evidence, I held that the questions of *bona fides* and solvency or insolvency must be decided against the bank.

I reserved judgment to consider whether any different or greater meaning was to be given to the words “unable to pay his debts in full,” than to “in insolvent circumstances.”

After hearing the argument yesterday in this Division in *Clarkson v. Sterling* (a), I have come to the conclusion that both expressions refer to the same financial condition ; that is, to a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted. I endeavoured, in *Clarkson v. Sterling*, to indicate what might be an unfair or unreasonable sale.

I also reserved judgment to consider whether the fact that all the assets were either mortgaged or under warehouse receipts rendered a debtor insolvent.

I do not think that fact alone would have that effect, else, to reduce it to an absurdity, a chattel mortgage of \$5 on \$5,000 worth of chattel property, and of a similar sum on real estate of the same value, being all a man's assets, would render him insolvent, he owing an unsecured creditor, say \$2,000.

In this case, on the uncontradicted evidence, the estate consisted of :

Farm, \$10,000 to \$12,000, say.....	\$10,000 00
Personal property on farm .....	1,650 00
Cedar Dale property .....	500 00
Two vacant lots, \$300 to \$350, say.....	300 00
Elevator and storehouse .....	10,000 00
Grain in storehouse—peas, &c .....	23,952 75
Due from G. T. R. on account siding .....	175 00
Book accounts, good .....	631 03
	<hr/>
	\$47,208 78



Brought forward ..... \$47,208 78

## LIABILITIES.

Western Bank of Canada .....	\$27,200 00
James Corbett, mortgage.....	3,000 00
James Robson, mortgage.....	650 00
Unpaid accounts for labour .....	50 00
Judgment, Dom. Bank v. Coryell ..	746 00
Farran, McPherson & Co .....	190 00
Wood note, say.....	500 00
Dominion Bank—Glen's note, say..	300 00
McFall & Lee, and other debts ....	1,400 00
	<hr/>
	\$34,036 00

Surplus ..... \$13,172 78

It will be thus seen that there was nearly enough grain in the storehouse to pay the Western Bank. The grain was an easily realizable asset.

The farm was sworn to be one of the best in the country, and readily saleable.

It, with the grain, would pay practically every dollar of the liabilities, leaving the balance to be paid out of the book debts—sworn to be good; and Coryell would have his elevator and warehouse and other property free, and would have an unencumbered estate of about \$13,000—far more than the majority of men are able to accumulate in a lifetime.

I cannot hold that equities of redemption are not assets realizable under execution, and which must be valued within the rules laid down in *Rae v. McDonald*, 13 O. R. 352, and in *Clarkson v. Sterling*, decided yesterday.

I must find, at the time of the seizure, the goods seized were not the property of the defendant Lewis J. Coryell, and liable to seizure under the writ of *fiery facias* as against the claimant Frederick William Cowan.

So far as I have power over costs I award them in favour of the defendant Cowan.

*Judgment for defendant.*

## [COMMON PLEAS DIVISION.]

## THE DOMINION LOAN AND INVESTMENT COMPANY V. KILROY.

*Husband and wife—Separate business—Husband as agent of wife—Property of wife—R. S. O. ch. 125 secs. 5-7—49 Vic ch. 19 (O.)*

K., who had failed in business and had become insolvent, about three years after the failure, made an arrangement with a wholesale firm to supply goods to his wife upon her own credit and responsibility. The wife had no capital of her own. The business was managed solely by the husband under power of attorney from the wife who took no part whatever in the same, and was at first carried on in premises owned by K., subject to a mortgage, on which she neither paid rent nor agreed to do so, but subsequently in premises leased by the wife. The goods were sold and further goods from time to time furnished by the firm on the like credit and responsibility. The plaintiffs had recovered a judgment against K. for a debt contracted by him before his failure upon which an execution was issued and the goods in question seized.

*Held*, [Rose, J., doubting] that the goods were the property of the wife and not of the husband.

THIS was an interpleader issue, tried before Galt, J., at Sandwich, at the Spring Assizes of 1887, the jury having been dispensed with by consent of the parties.

The plaintiffs, judgment and execution creditors of Thomas E. Kilroy, husband of the defendant, affirmed that certain goods, seized by the sheriff under an execution obtained by the plaintiffs against the goods and chattels of the said Thomas E. Kilroy, were liable to be seized on such execution against defendant; and the defendant denied it.

From the evidence it appeared that about six years before the trial, which took place on the 28th March, 1887, the said execution debtor failed in business, and became insolvent, and the plaintiffs recovered judgment against him in respect of a debt contracted before his failure. About three years after his failure he made an arrangement with a firm of wholesale grocers in the city of Brantford—Messrs. Watt & Sons—to furnish goods to the defendant, the claimant, upon her own credit and responsibility. He had a power of attorney from his wife to act for her, and managed the business for her. She

had no capital whatever at the time the first goods were purchased from Messrs. Watt & Sons.

The premises in which her alleged business was commenced were owned by her husband, subject to a mortgage to the plaintiffs, for which she neither paid rent nor agreed to pay rent to her husband or any one else; but, at the time of the seizure by the sheriff, the premises in which the goods were seized were held by her under lease in her own name from the owner.

The plaintiffs, at the trial, called the defendant, and read her examination under the Administration of Justice Act, in which she swore, among other things, as follows :

"I am the claimant in this action. Mr. Kilroy owned the premises. I did not agree to pay him any rent. I did not make any arrangement with him about the premises. I occupied the premises one year. I paid no rent for them; same premises as mortgaged to the Dominion Loan and Investment Society. Removed to the corner of Sandwich and Windsor Avenue. Mr. St. Louis owned this property. The property has been vacant ever since I left the premises on the Gravel Road. Left because I was not doing much there. No one occupied the premises on the Gravel Road before I went there. Mr. Kilroy had not been in business there since he failed until I went there. After I went into business Kilroy was my agent. He was to do all my selling and everything. I was not to pay him anything. The agreement with Kilroy is not in writing. He transacted all the business. He had failed in business before. He had not, and has not yet, obtained his discharge. He could not go into business himself. I went into business myself. I had no money to go into business myself. Mr. Kilroy wrote to Mr. Watt for me. I have no correspondence with Mr. Watt. Mr. Kilroy saw him. Kilroy made the arrangements for me. Kilroy made the arrangements how payments were to be made. Do not know how payments were to be made. I cannot say whether I am solvent or insolvent. Could not keep the books. Kilroy did everything. I have not seen a statement of assets and

liabilities since I went into business. I do not know what my assets consist of, or the amount of them. I do not know who my creditors are, or the extent of my liabilities. My husband has full swing to do as he thinks fit. Cannot say whether Kilroy acted differently in acting for me than what he would for himself. He bought what he liked. He gave credit to whom he pleased. I had no education to do business."

*George Watt* of the firm of *George Watt & Son* called for the defendant, said: "I sold to *Catharine Kilroy* a stock of goods. I think it was in December, 1883. The bill amounted to \$1862.14; a general stock of groceries. They were shipped to *C. Kilroy*. Windsor. They were sold on a four months note; no money was received at all. My firm got the notes. They were *C. Kilroy's* notes. We have continued to furnish *Mrs. Kilroy* with goods since, from time to time, till the present time. She owes now somewhere in the neighbourhood of \$2,000 to \$2,300. I think it would be in November I made arrangements for opening the account. I met *Kilroy* in the street in Windsor, and he said his wife was going into business, and I being an old friend of his, would I give her a stock of goods? I asked him had she any money, and he said 'no.' I said after I went home I would consult the rest of my partners, and, if they were agreeable, all right. I did so, and they were agreeable. I came back to Windsor in about a month. I saw *Kilroy*; *Mrs. Kilroy* was sick; I didn't see her then. I have seen her several times since. I do not know whether I supplied her with all the goods or not. I do not suppose all, but the great bulk. I suppose three fourths."

On cross-examination, he said: "I have known *Kilroy* for sometime. I knew him to be in the grocery business. I knew he had skill in that business. I knew he was pretty well up; I don't know what business he could control at all. It was more for the benefit of the family I gave him the goods. I certainly knew he was to manage the business."



His further cross-examination and re-examination were as follows :

“Q. You knew that he was the grocer? A. Yes, sir. Q. And it was his skill and knowledge that you relied on to make the business a success? A. I would not acknowledge that altogether. Q. Who else? Was she to bring any skill or knowledge to bear on the business? A. Well, I don't suppose she could fetch a great deal. Q. She could not bring skill or knowledge to bear on the business? Then in fact it was his skill and knowledge on which the success of the business depended? A. Well, it was. Q. His ability to manage on which the business depended, and the only reason for not sending the goods to him was that he was involved? A. He never asked for any goods. Q. If he had you knew he was involved? A. I would not have given him the goods if he wanted them for himself. Q. And the idea was that he would manage and bring his knowledge to bear in making the business a success? A. He would certainly help. Q. Now, your whole dealing was with him? A. How do you mean? Q. You never dealt with anybody else individually? A. No. Q. You never made a bargain with anybody else? A. No, he bought the goods as her agent. Q. The man who has ordered goods and the man who has conducted the business with you is the husband? A. Yes. Q. And he has been the one actively employed in carrying on the business to your knowledge? A. He has been there all the time certainly, and did the buying: he was acting as her agent. Q. Did the buying and selling and all the paying that was done? A. Whatever goods we sold were sold in good faith to Mrs. Kilroy. Q. That is a matter of law, not a matter of fact. Then I suppose really you are the person interested in contesting this suit?

HIS LORDSHIP—I suppose he is so. You are taking his property to pay your debt.

Q. You are really the man contesting here; you are a bondsman in this case? A. I am the bondsman? Q. You are the one really interested? A. That is so.

Q. That original stock of goods, have they been paid for? A. They have been paid for; but it is likely those goods were sold, and the money realized for them. Q. How much have you received since you opened the account? A. I could not tell you that. Q. About how much? A. I suppose there has been a business of between \$5,000 and \$6,000. Q. You have been paid for the original stock, and been paid perhaps for another amount equal to that? A. Something like that; if they bought a bill of goods to-day they get full time on it and pay next. Q. This would be about your third stock? A. There are about three years; they have been in business since 1883. Q. Can you tell me about the volume of goods per year? A. I say some place in the neighbourhood of \$5,000 or \$6,000 per year. Q. So there would be perhaps \$15,000? A. Somewhere in that neighbourhood. Q. Then part of the goods represent part of your profit? A. We have not made much profit out of it if we have to pay the Dominion Loan Company. Q. It would be pretty close profit? A. We would be out; the profits in the grocery business are small. Q. I notice you grocers get rich on them all the same? A. It is on paper most of it."

By Mr. White—"Q. Perhaps you would explain when your last shipment of goods to Mrs. Kilroy was? A. Some place in the neighbourhood of four or five weeks ago. Q. I mean the last previous to the seizure. The seizure was somewhere about the beginning of January? A. That would be the shipment in November likely. Q. Can you tell from your books? A. Not the books here; these are the books that ran from the first. Q. Can you tell the amount in November or December? A. Some place about \$500 or \$600; perhaps more than that. Q. You kept them supplied with goods as they wanted them? A. Yes."

*Harry Gooding*, a traveller for Messrs. D. S. Perrin & Co., swore that he had sold goods—confectionery—to the defendant, but transacted the business with her husband.

The learned Judge at the trial found the property was the property of the defendant, on the ground that the goods had been sold to her and upon her credit, adhering to the opinion, not concurred in by the rest of the Court, expressed by him in the case of *Meakin v. Samson*, 28 C. P. 355.

In Easter Sittings *Osler*, Q. C., moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiffs.

During the same Sittings, May 27, 1887, *Osler*, Q.C., supported the motion. The business must be carried on separately from the husband. It must be separate and distinct. The business here was managed and controlled by the husband, and he did as he liked with it. The wife knew nothing about it. Under the R. S. O. ch. 125, sec. 7, it has been clearly laid down that the business under such circumstances was that of the husband and not of the wife: *Meakin v. Samson*, 28 C. P. 355; *Levine v. Claflin*, 31 C. P. 600; *Harrison v. Douglass*, 40 U. C. R. 410; *Murray v. McCallum*, 8 A. R. 277; *Campbell v. Cole*, 7 O. R. 127. The 47 Vic. ch. 19, (O.), has not altered the law.

*Moss*, Q.C., contra. The goods here were sold to the defendant and on her credit. The mere fact that the business was managed by the husband could not have the effect of making the goods cease to be the wife's and to transfer them to the husband. Even under the R. S. O. ch. 125, sec. 5, the goods would be the wife's; but under the 47 Vic. ch. 19, (O.), the goods would clearly be the wife's. The wife is now placed in the same position as a *feme sole*: *Re Dearmer*, 53 L. T. N. S. 905; *Ashworth v. Outram*, 5 Ch. D. 923; *Hessin v. Bain*, 2 O. R. 302; *Berry v. Zeiss*, 32 C. P. 231; *Thicknesse on Husband and Wife*, 205, 206.

June 25, 1887. CAMERON, C. J.—It is impossible not to see from the evidence that it was the husband who controlled and managed the business: that it was a

business virtually carried on to enable him to live and support the family. But it was conceded at the trial on behalf of the plaintiffs that Watt & Son had sold their goods on the credit of the defendant. And we have to consider the present condition of the law in respect to the right and power of a married woman to hold property, and carry on business in her own right, independently of her husband ; and how far she may avail herself of her husband's agency and assistance, without making the property she claims liable to her husband's creditors.

The finding of the learned Judge at the trial is now questioned ; and it is contended on behalf of the plaintiffs that, upon the adjudged cases, it is impossible to hold the goods seized by the sheriff are the goods of the defendant against the plaintiffs' execution.

Mr. Osler has very forcibly contended that as the law was under section 7 of R. S. O. ch. 125 the cases of *Meakin v. Samson*, 28 C. P. 355 ; *Levine v. Claflin*, 31 C. P. 600 ; *Harrison v. Douglass*, 40 U. C. R. 410 ; and *Murray v. McCallum*, 8 A. R. 277, are authorities conclusive in the plaintiffs' favour, and 47 Vic. ch. 19, (O.), has not altered the law.

By sec. 5 of ch. 125 R. S. O., it is provided : " Every woman who has married since the 4th day of May, 1859,

\* \* without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold, and enjoy all her personal property, whether belonging to her before marriage, or acquired by her by inheritance, bequest, or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition, without her consent, in as full and ample a manner as if she continued sole and unmarried ; but this clause shall not extend to any property received by a married woman from her husband during coverture."

This language could scarcely be made plainer or more explicit to shew the Legislature had determined to change the common law that made the wife's personal property



the husband's as an incident of their marriage, except in the single instance where the property came from the husband to the wife during coverture. This clause had relation to property solely, and did not affect the relation of husband and wife in any other respect, still leaving him with such dominion as he had previously enjoyed over her person and earnings.

But section 7 weakened this dominion, as it provides that "All the wages and personal earnings of a married woman, and any acquisition therefrom, and all proceeds and profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, moneys, or property, shall, after the second day of March, 1872, be free from the debts or dispositions of her husband, and shall be held and enjoyed by such married woman and disposed of without her husband's consent as fully as if she were a *feme sole*, and no order for protection shall hereafter be necessary in respect of any such earnings or acquisitions; and the possession, whether actual or constructive, of the husband, of any personal property of the married woman, shall not render the same liable for his debts."

In the face of these provisions it is difficult to accept the decision in *Meakin v. Samson* as sound, except upon the ground that in fact the gentlemen who swore they sold their goods to Mrs. Meakin were not telling the truth, and the sale was not in fact made to her but to her husband. The property, the subject of the interpleader, was, undeniably, upon any other ground, the property of the wife, and not the husband. Had the creditors who sold the goods made a free gift of them to the wife, they would, under the express words of section 5, have become the property of the wife, free from the debts and control of the husband. And I think the words, "or acquired in any other way," wide enough to cover a purchase on credit, when, by section 18, it is expressly enacted, "A husband shall not be liable for any debts of his wife in

respect of any employment or business in which she is engaged on her own behalf, or in respect of her own contracts."

If, therefore, the present case is governed by the Married Woman's Property Act, R. S. O. ch. 125, I should be in favor of the view that the goods seized by the sheriff were the goods of the defendant against the plaintiffs' execution. Watt & Son did not sell the goods to the defendant's husband, but to the defendant, and upon her credit; and I cannot believe that, although that was the case, by force of the common law, and against the express terms of the statute, the property became, from the moment of its delivery under the sale to the wife, the husband's, and subject to his control against his wife's will, and liable for his debts.

But the Married Woman's Property Act of 1884, 47 Vic. ch. 19 (O.), is not the same in its language as R. S. O. ch. 125, which it repeals, except as to acts done and rights acquired by the husband or wife before the coming into force of the Act of 1884.

By section 2 of this latter Act "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." And the effect of sub-sections 2, 3 and 4, is to make a married woman liable on her contracts, whether she has separate property or not.

If a married woman is capable of acquiring property in the same manner as a *feme sole*,—and by this enactment she is so rendered capable,—she must have a right to acquire goods and chattels by purchase either for cash or on credit, for a *feme sole* could so acquire them. There is no doubt considerable difficulty in determining what the Legislature had in view in using the word, "separately," in clause 7 of the repealed Act, and in clause 3 of the Act of 1884. To me it seems that where the husband carries on the business, and the wife assists him therein, she has no right

to wages or earnings derived from the business though money of her own may be invested therein, because it is his business, and not her's carried on separately by her. But when the wife procures the goods or provides the money, and carries on the business in her own name, though her chief agent or manager is her husband, if he has no right, interest, or control in the business except what she, as an act of grace, choses to accord him, the business is her's, carried on by her "separately from her husband."

In the present case the goods were supplied to the wife ; the business was carried on in her name by the assistance of her husband, she herself being incapable, from want of knowledge of it, of carrying on such a business ; but the goods could not cease to be her's by this management of the husband any more than would be the case if a married woman had devised to her a farm with farm cattle and stock, and she employed her husband to drive her horses and cultivate her farm. His driving the horses and cultivating the farm would not deprive her of the ownership of the property therein.

The question is not here presented whether any profit has been made in the business carried on and reinvested in the goods seized—the contest is as to whether the goods were not at all times the husband's, and never the defendant's. In other words, it is contended that no person, under the circumstances detailed in evidence, could be taken to have sold the goods to the defendant, no matter what his intentions were, but such sale must be taken to have been made, by force of law, against the intention of all the parties concerned to the husband.

The law does not encourage idleness, but it certainly does not prevent a married woman, who can do so, from keeping her husband in idleness if she chooses, or from allowing her husband to use her property so as to make a living out of it without transferring the property to him, or making it liable for his debts.

I think, therefore, the plaintiffs' contention cannot be upheld; and, unless it can be said that the sale was not made by Watt & Son to the defendant—but the fact was the goods were sold to the husband as the person whose liability was to be looked to quite apart and disconnected from the success of the business—the defendant's title is the strongest.

It seems to me, if the wife died under the circumstances in evidence, before the goods could be legally dealt with, administration to her estate would have to be taken out. While in *Re Gearing*, 4 A. R. 173, Moss, C. J., expressed the opinion that *Meakin v. Samson*, 28 C. P. 355, was well decided, he held that on the purchase by Mrs. Gearing of her husband's assets, those assets formed part of her separate estate. And he remarks, on page 178, and these remarks are pertinent to this enquiry: "While the provincial statute protects her" (the wife) "in the enjoyment of her separate property, and places it beyond his control or disposition without her consent, and while it provides that all proceeds or profits from any occupation or trade which she carries on separately from her husband shall be free from his debts or disposition, and shall be held and enjoyed by her, and disposed of without her husband's consent as fully as if she were a feme sole, it does not prevent her from permitting him to carry on trade with the property on such terms as she thinks proper."

The facts in *Campbell v. Cole*, 7 O. R. 127, cited by Mr. Osler, were very different from the present case, though the endorsement by the learned Chancellor therein, at page 135, of the language of Chief Justice Harrison, in *Harrison v. Douglass*, 40 U. C. R. 415, makes strongly against the defendant in this case.

The language is as follows: "If the occupation or trade be such that the wife cannot carry it on without the husband's active co-operation or agency, it is not easy to discover in what sense it can honestly be called an occupation or trade, carried on by her 'separately from her husband.'"



Though there was nothing in the nature of the grocery business here which the wife might not have managed, she did not in fact manage it; and so, in the sense of the language used by Chief Justice Harrison, she was not carrying on the business separate from her husband. But, assuming that to be so, it is not decisive of the question, was this property the property of the defendant as against the plaintiffs? Here, if that were a matter of any moment, no creditor of the defendant's husband, in respect of any debt contracted by him since his wife has assumed to carry on the business, has made complaint. It is the persons who have chosen to trust the defendant who will be injured if it is determined, as matter of law, that the property seized is liable for the husband's debts. The law ought not to be strained to work an injustice; and if the law permits a married woman to buy property by express statutory enactment, without prohibiting her from allowing her husband to use it, it would be straining the law to hold, because another provision of the statute gives to a married woman the earnings and profits of a business carried on by her separately from her husband, that the goods or capital of the wife in the business becomes the husband's by reason of his using them to acquire earnings and profit.

The opinion I held in *Murray v. McCallum*, 8 A. R. 306, I still think expressed the meaning of "the carrying on business separately;" and in every case it must be a question of fact, whose is the property, the wife's or the husband's?

The finding of the learned Judge at the trial must, I think, be upheld, and the motion to enter judgment for the plaintiffs be dismissed, with costs.

The law is certainly, on the adjudged cases, not in a very satisfactory state; and, as Mr. Osler urged, it may have been very difficult for counsel to advise with any degree of confidence; but I hope the Act of last session, 50 Vic. ch. 7, secs. 22-25, (O.), will have removed most of the difficulty.

ROSE, J.—I quite agree that a married woman who has purchased goods on her own credit, may open a store in her own name, and allow her husband to have sole control and management without her assistance in either buying or selling, and that such action on her part will not be a transfer of her property in the goods to her husband.

But as such business is not, in my opinion, one carried on by her "separately from her husband" within section 7 of ch. 125, the "proceeds or profits from" such "occupation or trade," are not protected by such section from her husband's creditors.

If such proceeds or profits going into the hands of her husband are by him invested in any property which his creditors can reach by execution or otherwise, his wife's claim to such property would not avail against such creditors.

If, however, such proceeds or profits are not invested by the husband in the purchase of property but are expended by him in the maintenance of his family, I do not see that his creditors could reach such proceeds or profits in any way.

If in a business so carried on by the husband in the wife's name, the proceeds or profits are by the husband paid to merchants for goods sold by them to his wife, then, whether such new goods purchased would be liable to be taken by the husband's creditors, is a question which I am not at present able to determine adversely to the claim by such creditors.

As the learned Chief Justice and my brother Galt have come to the conclusion that the defendant's claim is valid, I do not think it expedient to delay the giving of judgment, to further consider whether "proceeds" and "profits" should be construed to mean the same thing. If "proceeds" have reference to the moneys realized from the sale of the goods used in the business, and such moneys, while in the hands of the husband, would not be protected against his creditors by his wife's claim, it would seem difficult to hold that the goods purchased

by him for his wife, and paid for by such money, the "proceeds" of the goods would be protected by the wife's claim.

If "proceeds" mean "profits," then only so much of the profits as could be traced into the purchase of new goods would go to the husband's creditors.

If either view should be the correct one; that is, if either the proceeds or the profits cannot be protected by the wife's claim, there should be a reference to the Master to take an account, and the husband's interest in the goods should go to his creditors. See *Jackson v. Bowman*, 14 Gr. 156.

On the whole, I concur, doubting much, but not feeling strong enough to dissent.

GALT, J., concurred with CAMERON, C. J.

*Motion dismissed.*

## [COMMON PLEAS DIVISION.]

## THE BANK OF MONTREAL V. STEWART.

*Trust—Parol evidence of—Sufficiency—Statute of Frauds—Mortgage registered without notice of trust.*

In an action for the possession of lands under a mortgage by defendant's brother W., and the foreclosure thereof, the defendant claimed under a trust of the lands by W. in his favour; and also a title by possession. The trust was a parol one, namely, that W. should procure a lease of the lands for defendant, who was then under age, from the Canada Company, the lease apparently containing a right of purchase; and should afterwards pay the purchase money and take the deed in his, W.'s, name, and hold it until defendant became well when he was to transfer it to the defendant, he having been ill at the time. The defendant paid the money for the lease and the purchase money for the land. *Held*, that the parol evidence was not sufficient to support the trust; but, in any event, as the trust was to be enforced against W. and his grantees it could not prevail against plaintiffs' mortgage, it having been registered without notice of the trust.

*Held*, also, that the evidence failed to establish a title by possession.

THIS was an action for the possession of lands, tried before Rose, J., without a jury, at Whitby, at the Spring Assizes of 1887.

*Hudspeth*, Q.C., for the plaintiffs.

*Lount*, Q.C., and *Stewart*, for the defendant.

The facts appear in the judgment.

May, 12, 1887. ROSE, J.—The issue in this case is, whether the land belongs to the plaintiff under a mortgage from one Wm. Stewart, brother of the defendant, and proceedings thereon whereby a final order of foreclosure was obtained; or to the defendant, who claims under a trust, and the Statute of Limitations

The statements of fact appearing in the defendant's evidence are not contradicted, the plaintiffs not having any evidence in their power enabling them to offer contradiction.

The conclusions of fact and law must, therefore, be drawn from such evidence and the documents put in.

It appears that in or about the year 1834 the defendant and his brothers William, Neil, and Donald, came to this



country from Scotland with their mother, then a widow, and settled on lot 4 in the 1st concession of Thorah, as I understood, being about seven miles distant from the land in question.

The defendant was the youngest, then being about three years of age, Donald the eldest, and William about twelve years older than the defendant.

Donald and William acted as protectors of the family ; and the defendant was sent to school.

Upon the mother's death, Donald, William, and the defendant remained together on lot 4, and are now living together unmarried. Neil married, and moved away.

For many years the three brothers apparently had all things in common, except it is said that Donald had the north half of lot 4, and William the south half, no lot at that time being set apart for the defendant.

The defendant was the better educated, and kept the accounts, and might, perhaps, be styled the man of business for the three.

When the defendant was about sixteen or eighteen years of age, and still at school at Beaverton, he says he gave William about \$12 to enable him to take out, what he calls, a lease of the land in question from the Canada Company. The document was not produced, but I surmised it contained an agreement by the company to sell. This money, the defendant said, was his own.

The lease was taken out in William's name—why, it was not said, but possibly because the defendant was not of age.

After about twelve years the deed was taken out, also in William's name, the defendant saying that he gave the money to William to pay the company the purchase price. The defendant says the purchase was for him.

This money probably came out of the common fund, and was made off lot 4 on which the three brothers lived.

The reason why it was taken out in William's name was, as stated by the defendant, that he (the defendant) was very ill, and not likely to recover ; and that it was agreed between him and William that the deed should be taken

out in William's name, and the land conveyed to him (the defendant) if he recovered. I do not remember that it was stated what was to be done with it in the event of the defendant's death.

Mr. Hudspeth objects that this agreement, not being in writing, is void and of no effect under the 7th section of the Statute of Frauds.

The defendant paid the taxes on the lot, and says it was assessed in his name; and as early as 1855 he took out logs, building a lumber shanty for such purpose. The lot was a wild lot.

He says he told one William Campbell to look after the lot and prevent trespassing. I have not noted whether he said during what years this oversight was had.

He further said that from time to time he went to the lot to see that there was no trespassing: that in 1871 he took off shingles, working a good part of the winter with two men: that in 1872 he sold the pine timber on the lot to one Ross for \$900, and received the money: that one Brown made sugar on the lot: that his nephew, also, named Archibald, with his permission, cleared about six acres on the south half of the lot, and fenced it in a rough sort of a way, but did not live on it: that he (the defendant) a year ago last spring, did some chopping on the place.

The deed to William was dated on the 30th of January, 1861; was unregistered, and produced from the possession of the defendant. It was not shewn how the plaintiffs obtained the description for the mortgage.

On the 15th November, 1883, William executed a mortgage to the plaintiffs to secure a note for \$4,500, made by William to one McAlpine, and endorsed to the bank, upon which mortgage proceedings to foreclose were taken, and a final order obtained on the 9th of February, 1886.

The defendant had no knowledge of the mortgage being given, and gave no authority to William to execute it; and the plaintiffs had no notice of the defendant's claim when they received the mortgage. The mortgage was registered

on the 17th November, 1883, and the patent to the Canada Company on the 26th October, 1846.

On the 7th July, 1872, William executed a conveyance of the pine timber on the lot to one Proctor, which was registered on the 19th July, 1872.

This fact only appeared after the oral evidence, on production of the abstract of title, which I allowed to be supplied; and no explanation appears of the defendant's statement that in 1872 he sold the pine timber to Ross.

The first question is, whether the trust that the defendant sets up is an express or a resulting trust.

The distinction between an express and a resulting trust may perhaps be found in the definition of a trust by operation of law, which includes a resulting trust; and may be found in a foot note to p. 108 of the 8th ed. of *Lewin* on Trusts, and is as follows: "Trusts by operation of law are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity, and are either—1. Resulting trusts \* \*. 2. Constructive trusts \* \*."

An express trust, I take it, is one declared either directly or indirectly.

In this case the trust, as shewn by the evidence, seems to me to have been declared by the parties, and to have been that William should take out the deed in his own name and hold it until the defendant became well, when he should convey the land to him. As I have said, I did not note that it was agreed what William was to do with the land if the defendant died; but, judging from the dealings of the three brothers between themselves, I should think it was understood he should hold it for Donald and himself. This of course is pure conjecture.

If this was a declared trust then, under *Wilde v. Wilde*, 20 Gr. 521, at p. 531, the 7th section (Statute of Frauds) forms a rule of evidence, and prevents the trust being proven by parol; and I have no evidence before me of such trust.

The same case shews (p. 534), failing by reason of the statute to prove the parol trust, the defendant cannot prove a trust by operation of law. See, also, *Wright v. Leys*, 8 O. R. 88.

If this difficulty be gotten over, the plaintiffs contend that as the trust was one to be enforced against William and his grantees, it cannot prevail against the mortgage deed by William to the plaintiffs, it having been registered without notice of the alleged trust. See sec. 81 of the Registry Act, R. S. O. ch. 111, and *Grey v. Ball*, 23 Gr. 390.

There being no evidence of any trust, as I have held, the evidence is merely of a deed to William and a mortgage from him to the plaintiffs, and occasional acts of the defendant of occupancy of the land.

Having regard to the decisions in *Harris v. Mudie*, 7 A. R. 414, and *Shepherdson v. McCullough*, 46 U. C. R. 573, it seems to me the defendant has not shewn any acts of occupancy which could be referred to the boundaries of the lot in question, or so continuous in their nature as to give title, unless it may be as to the six acres cleared and said to be enclosed by the nephew; and as to that my notes do not shew any date prior to the ten years when such occupancy commenced. If I am in error as to that the parties may speak to the point, and I will further consider the evidence. At present I do not think the defendant, failing in shewing any trust, can be held to be a person holding under a supposed title to which the occupancy could be referred; as, if I gave effect to such an argument, it would be considering evidence of the alleged trust, which I think I cannot do.

I think the plaintiffs are entitled to judgment, as prayed, with costs of suit.

*Judgment for plaintiffs.*

---



## [COMMON PLEAS DIVISION.]

## CARR V. THE FIRE ASSURANCE ASSOCIATION.

*Insurance (Fire)*—14 Geo. III. ch. 78, sec. 83—*Applicability to this Province—Buildings—Machinery—Fixtures—Equitable right to insurance moneys*—R. S. O. ch. 136, sec. 12.

A mortgage was made by T. H. C. and B. H. C. to D. of certain lands which contained a covenant to insure in a sum named. A second mortgage was made by the same parties to a bank to secure an indebtedness which also contained a covenant to insure without specifying any amount. At the date of the first mortgage there was an insurance for \$1,400, which was allowed to lapse. On the bank manager discovering this he procured T. H. C. to effect an insurance, advancing the money to pay the premium, charging T. H. C.'s account therewith, and discounted a note made by T. H. C. and endorsed by B. H. C. to cover same. The policy was to T. H. C. alone, and was, on saw mill, \$400; on fixed and movable machinery, shafting, gearing, &c., \$1,000; on boiler and connections, \$100, and on engine and connections, \$500. Loss, if any, payable to the bank. On a fire occurring and the property being burnt D. required the insurance company to expend the moneys so far as they would go in rebuilding the insured premises.

*Held* [CAMERON, C. J., doubting], following *Stinson v. Pennock*, 14 Gr. 604, that the 14 Geo. III. ch. 78, sec. 83, is not merely of local application, but extends to this province and applies to a case like the present.

*Held*, also [CAMERON, C. J., dissenting], that as between mortgagor and first and second mortgagees the fixed and movable machinery, &c., boiler, and boiler connections, &c., were included under the word "building" in the said section so as to entitle D. to the benefit of the insurance thereon, for as between the parties they were treated as part of the freehold and passed as such.

*Per* CAMERON, C. J.—The operation of the statute should not be extended beyond its express words, and they limit its operation to an insurance upon a house or building as such, and do not extend to a distinct insurance of fixtures or machinery as such.

*Per* CAMERON, C. J., also. Apart from the claim of the bank or their assignees, D., as mortgagee on a mortgage with a covenant to insure would in equity be entitled to the insurance money if the insurance had been effected by both mortgagors, and the provisions contained in sec. 12 of R. S. O. ch. 136, are merely a legislative affirmance of such right.

THIS was an action tried before Rose, J., without a jury, at Barrie, at the Fall Assizes of 1886.

The action was brought by the plaintiff, as assignee of the Bank of Toronto and of Thomas H. Carr, against the defendants, upon a policy of insurance, issued by the defendants to the said Thomas H. Carr, the loss, if any, to be

paid to the Bank of Toronto under the following circumstances: The defendants did not dispute their liability to pay the insurance money, but, previous to the commencement of this action, they had been served with notice under the Imperial Act, 14 Geo. III. ch. 78, sec. 83, on behalf of Nathaniel Dymont, who was first mortgagee of the land and premises, requiring the defendants to expend the insurance money in rebuilding the burned buildings as far as the same would go; also claiming the amount insured under the mortgagor's covenant to insure, and offering to pay the bank their claim against Thomas H. Carr, on receiving an assignment of the securities held by the bank.

This notice was dated the 18th of November, 1885, and the assignment by the bank of their interest in the policy and insurance money was dated the 7th of January, 1886.

After the action was commenced the defendants, under an order made by a Judge authorizing such payment paid the insurance money into Court; and this action was, in reality, a contest between the plaintiff and the first mortgagee, Dymont, as to which was entitled to the money, as it had been agreed between the parties if Dymont was entitled to have the insurance money spent in rebuilding, it might be paid out of Court to him on account of his mortgage debt.

The mortgage to Dymont was made by Thomas H. Carr and Benjamin Henry Carr, and bore date the 7th December, 1882; and, among other lands, covered lot number 12 in the 2nd concession of Flos.

The Bank of Toronto also held a second mortgage covering the same land, executed by the mortgagors, Thomas H. Carr and Benjamin H. Carr, and securing a large indebtedness from them to the bank. This mortgage bore date the 2nd of November, 1883.

The plaintiff, the father of Thomas H. Carr, was a surety for him to the bank.

The mortgages to Dymont and the bank both contained covenants on the part of the mortgagors to insure the premises and assign the policies. The covenant in the bank

mortgage did not specify any sum in respect of which the insurance should be effected, while that to Dyment required an insurance of \$3,200.

At the time of the first mortgage, or shortly thereafter, there was an insurance for \$1,400 effected. This policy was allowed to expire without renewal. The bank manager discovering this insisted upon Thomas H. Carr effecting an insurance, and advanced him the amount required to pay the premium, charging him in account with the amount, and discounted a note made by him, and endorsed by the plaintiff, to cover the overdraft of Thomas H. Carr's account by reason of the advance.

The policy bore date the 13th of December, 1884, and insured Thomas H. Carr alone: on saw mill, \$400; on fixed and movable machinery, shafting, gearing, and belting, \$1,000; on boilers and boiler connections, including smoke stack, \$100; on engine and connections, \$500—loss, if any, payable to the Bank of Toronto. The insured premises were destroyed by fire on the 10th of October, 1885, and were described in the policy as on lot number 12, in the 1st concession of Flos.

Upon the above facts the learned Judge, upon the authority of *Stinson v. Pennock*, 14 Gr. 604, directed judgment to be entered for the defendants.

In Michaelmas Sittings, 1887, *H. H. Strathy*, Q.C., moved on notice to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff.

During Easter Sittings, 1887, *H. H. Strathy*, Q. C., supported the motion. The 14 Geo. III. ch. 78, is only of local application and is not in force in this country; but, if in force, it does not apply in a case of this kind, where the insurance was effected by arrangement with a second mortgagee for the latter's benefit. The first mortgage was made not by the insured alone but by the insured and another; and the statute has no application to such a case; and, at all events, the first mortgagee had only a right to have applied in rebuilding so much of the insurance money as re-

lated to the building and not to the amount insured upon machinery, fixed or movable. Also the building insured was not on the premises mentioned in the mortgage to Dymont. He admitted, however, that this was an error in the policy, as the building intended to be insured was on the mortgaged premises. He referred to *Stinson v. Pennock*, 14 Gr. 604; *Brooke v. Stone*, 34 L. J. N. S. Ch. 251; *Ex p. Gorely*, 10 Jur. N. S. 1085.

*McCarthy*, Q.C., and *Pepler*, contra. The judgment of the learned Judge is right, and should not be reversed or varied. The case of *Stinson v. Pennock*, 14 Gr. 604, a decision binding on the Court was well decided, and showed that the first mortgagee had the right to have the insurance expended in rebuilding. But, apart from this, he had such right under the covenant to insure in his mortgage, and sec. 12 of R. S. O. ch. 136. The covenant in Dymont's mortgage is to insure; and that means to insure buildings and fixtures; that as to movable machinery not fixtures, he has no claim. The error in the description of the premises was only *falsa demonstratio* and unimportant. They further referred to *Greet v. Citizens Ins. Co.*, 27 Gr. 121; *Broom's Com. Law*, 6th ed., 584,

June 25, 1887. CAMERON. C. J.—The case of *Stinson v. Pennock*, 14 Gr. 604, is conclusive, as far as this Court is concerned, that the 14 Geo. III. ch. 78, sec. 83, is in force in this Province; and unless, as contended by Mr. Strathy, that statute was only of local application in England, it is clearly part of the statute law of England made the law of this Province. That it was not of local application was decided by the case of *Re Barber*, 34 L. J. N. S. Bank. 1, referred to by Mowat, V.C., in *Stinson v. Pennock*. There can be no doubt either that in equity, without the aid of the provision contained in sec. 12 of R. S. O. ch. 136, Dymont, in the absence of any claim by the Bank of Toronto or their assigns, would as a mortgagee on a mortgage, with a covenant by the mortgagor to insure, be entitled to the insurance money if the insur-



ance had been effected by both mortgagors; and that provision is but a legislative affirmance of such right: *Watt v. District Mutual Ins. Co.*, 8 Gr. 523; *Greet v. Citizens Ins. Co.*, 27 Gr. 121.

Dealing with the rights of the parties under the 14 Geo. III. ch. 78, in the first place, on the assumption that that statute is in force in this Province, does that statute apply in the circumstances of this case, where the insurance has been made upon the express stipulation with the insurance company, that the loss shall be paid to a subsequent mortgagee who has advanced the money to pay the premium payable on the effecting of the insurance? The language of the clause is extremely wide, and would seem to render it necessary, even in the case of an insurance effected under a covenant to insure contained in a first mortgage for the protection of the mortgagee upon request of a second or any subsequent mortgagee or person interested in the property, no matter how remotely, for an insurance company to expend the insurance money in rebuilding as far as it will go. This is a consequence that I do not think has entered into the contemplation of those who are taking mortgage securities with such covenants to insure, and may prove exceedingly hurtful and embarrassing in its result.

The clause, as far as necessary to be considered, is as follows: "Be it further enacted \* \* that it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorized and required, upon the request of any person or persons interested in or entitled unto any house or houses, or other buildings which may hereafter be burnt down, demolished, or damaged by fire \* \* to cause the insurance money to be laid out and expended as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall within sixty days after his, her or their claim is adjusted, give a sufficient security to the governors or

directors of the insurance office where such house or houses or other buildings are insured, that the same insurance money will be laid out and expended as aforesaid ; or unless the said insurance money shall be, in that time, settled and disposed of, to, and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

This language is large enough to embrace any insurance whatever, whether effected by a mortgagee, a mortgagor, a purchaser of the property with the title incomplete and a part of the purchase money paid, a lessee, or other interested person, whomsoever, having a right to insure in respect of his interest. In many instances the enforcement of the provision would be destructive of the interest of the party who insured to obtain the benefit of the insurance. Property is never insured, except through error or fraud, to its value, and often nearly the whole value of the property is in the buildings. In such case, if a mortgagee insures his interest, the amount insured will not go half way towards the restoration of the building. In its imperfect state it cannot be occupied, and will not sell for the value of the land and the amount expended in its partial restoration, and thereby the object of the insurer is wholly frustrated to the real benefit of no one.

The Act, too, seems to contemplate a ratable disposition of the insurance money among all the interested parties ; and yet what real equity is there in giving to B. the benefit of A.'s personal contract with C., the consideration for which goes entirely from A. As between the mortgagor and the mortgagee the former is not entitled to the benefit of an insurance effected by the latter to protect his own interest, the premium for which he has paid himself. The Act, though based upon a good object, if it is to be followed according to its terms, will militate against the right of parties to make *bonâ fide* beneficial contracts in respect to the disposition of insurance moneys, and render such contracts wholly inoperative. That could scarcely have been in the contemplation of the framers of the Act.

It was, it appears to me, intended to reach the simple case of a person interested in a house or building insuring it for his own protection, and not the protection of any one else also interested, to deter such person from wilfully setting fire to his house or building, which is the declared object of the clause as set forth in the preamble. But the operation of the clause is not limited to cases where the object is made to appear.

I am not therefore in a position to say that the conclusion of my learned brother Rose at the trial is wrong in holding that the enactment applies to a case like the present. But I think the operation of the statute should not be extended beyond its express words; and these words limit its operation to the insurance upon a house or building as such, and do not extend to a distinct insurance of fixtures or machinery as such.

Assume for the purpose of considering this point that there had been no insurance whatever upon the building, but only upon the fixed and movable machinery, boilers and boiler connections, engine and connections, which might be part of the realty or chattels according to the intention of the parties, could it be said that the insurance was within the terms of the Act upon the building; and assume that the building itself was left intact, but the machinery was destroyed, how could the insurance money be applied in the restoration of that which had not been destroyed?

The case of *Ex p. Gorely*, 10 Jur. N. S. 1085, cited on the argument, shows that the statute does not extend to fixtures insured as such.

In this view of the question the mortgagee, Dymont, at most could require to have \$400 insured on the building applied towards rebuilding.

The 14 Geo. III. ch. 78, sec. 83, is wholly inconsistent with our R. S. O. ch. 162, to secure uniform conditions in policies of insurance.

By the 17th condition under the Act a loss is payable in thirty days after completion of proofs of loss unless the

insurance is effected under some special statute giving a different time, or where by the agreement of the parties a shorter or longer time is given for payment. And by condition 18 the company, "instead of making payment, may repair, rebuild, or replace, within a reasonable time, the property damaged or lost, giving notice of their intention within fifteen days after the receipt of the proofs" of loss; while by the 14 Geo. III. ch. 78, the insurers have sixty days after the claim has been adjusted to ascertain whether the insured has settled with the other claimants; no time is fixed when the request to expend the money in re-building is to be made; and presumably it would be in time if made at any time before the insurance money is paid over to the assured.

I am very much, as I have said, inclined to the view the Imperial statute should be held not to be applicable at all to the circumstances of the present case, though I cannot say positively it is not. It is certainly inoperative as to all the insurance money except the \$400 on the building. This, however, is not decisive of the rights of the parties.

The effect of sec. 12 of R. S. O. ch. 136 must be considered. This enactment provides: "The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant."

This gives a mortgagee, as between him and his mortgagor, the same rights in respect to an insurance effected by the latter, that he would have had if the insurance had been made strictly in accordance with his covenant. The covenant of the mortgagor in this case with Dyment was as follows: "And the said mortgagor will insure the buildings on the said lands to the amount of not less than three



thousand two hundred dollars in some company to be approved of by the said mortgagee." The effect of this covenant is to bind the mortgagor and his heirs under R. S. O. ch. 104, covenant No. 12.

Is section 12 of ch. 136 to have any larger effect, and to make the act of a subsequent mortgagee in effecting an insurance, the act of a person claiming under the mortgagor ?

I am of the opinion a person claiming under a lessee or mortgagor is a person who has acquired all the right or property of the lessee or mortgagor; and a second mortgagee is not such a person; and so an insurance effected by the Bank of Toronto, in respect of their interest as second mortgagees, would not be an insurance to which the first mortgagee, Dymont, under the covenant in his mortgage would be entitled to the benefit; nor is he so entitled to the benefit of the insurance effected by Thomas H. Carr under the circumstances given in evidence.

It was pointed out by Mr. McCarthy, on the argument, that the Bank of Toronto had notice of the prior mortgage, because in the mortgage given to the bank, the mortgagor's covenant against encumbrances excepts the mortgage to Dymont, not by referring to Dymont by name, but by stating the amount of the prior mortgage to be \$4,500, which is the amount of Dymont's mortgage. I do not think this amounted to notice of the covenant to insure, if such notice could make any difference. The equity of the plaintiff, it seems to me, is quite as strong as that of Dymont to the insurance money; and, except as to the sum of \$400 insured upon the building, I think the defendants have failed to make out any defence; and the judgment in favour of the defendants should be set aside, and judgment entered for the plaintiff, with costs.

The money paid into Court, except the \$400, and any interest payable in respect of that amount, must be paid out to the plaintiff; and the said sum of \$400, and the interest accrued thereon since the same has been in Court, must be paid to Nathaniel Dymont in reduction of his mortgage.

I have not dealt with the question, how far the error in the description of the land on which the insured buildings are stated in the policy to be situated, as the objection was not very strenuously presented, though I think it might present a very strong obstacle in the way of Dymont enforcing any part of the claim he has made.

ROSE, J.—While quite agreeing with the learned Chief Justice in the conclusion that the Act might as a matter of convenience be well considered as not applying to this country, and that its application to such cases as suggested by him may work out absurdities and injustice, I am unable to agree that the mortgagor can by dividing up the insurance, as here, prevent the application of the statute.

It strikes me thus: As between mortgagor and mortgagee, the “fixed and movable machinery, shafting, gearing and belting, boilers and boiler connections, including smoke stack, engine and connections,” are included under the word “building.”

In *Ex p. Gorely*, 10 Jur. N. S. 1085, the test is given by which to decide whether the machinery would come within the 83rd section of the 14 Geo. III. ch. 78, and is as follows: At the moment before the destruction took place the mortgagor had made a conveyance of the freehold, would the machinery, &c., have passed under the words “houses or other buildings?” If so, then they come within that section.

If the mill property in question had been mortgaged and the mortgagor had given a covenant to insure the mill, and then had effected an insurance of the machinery alone, could he deny after a fire that the mortgagee would be entitled to the insurance money?

The rights here are to be determined as between the mortgagor and first and second mortgagees. Can it be successfully argued that, as between the first and second mortgagees, the machinery, &c., were not included in the conveyance of the freehold and passed as part and parcel thereof? The case of *Harris v. Mallock*,

21 U. C. R., p. 82, shews that where an owner of land executed two mortgages to separate mortgagees and afterwards placed machinery in the mill, the machinery being described as "Steam engine, boiler, and machinery shafting, and other things belonging to a steam saw mill," and the mill burned down, the injured machinery removed to another county, with the assent of the holder of the second mortgage, to be set up in a new mill, was exempt from seizure under an execution against the mortgagor. Robinson, C. J., said, at p. 85: "When they were fixed afterwards in the mill they became part of the freehold; and, of course, from that time belonged to the owner of the land."

The question is not here between the insurance company and the mortgagor. We have not to consider whether by contract between them the machinery may be insured as chattels; but whether, as between the mortgagor and first and second mortgagees, having insured under the name of machinery &c., that which, as between them was a part of the building, the second mortgagee can as against the first say it was not part of the building, and so did not come within the statute.

The only interest the Bank of Toronto, as second mortgagees, had in the property insured was as mortgagees, and the mortgage to the bank was of the land as such, and there was no conveyance to it of the chattels. If, therefore, the machinery, &c., was not part of the building it did not pass to the bank under its mortgage, and so the bank had no interest in the property insured to justify its demand upon Carr to insure under the covenant in its mortgage.

It would seem clear that the insurance by Carr at the instance of the bank could not be treated in any different manner than if he had insured at his own instance. The bank pressed him to insure and he did so, borrowing from it the money necessary to pay the premium.

If it were necessary to consider whether or not a second mortgagee was a person claiming under a mortgagor within the 12th section of R. S. O. ch. 136, I would require

fur ther time for consideration. I desire to leave the question open.

As, in my opinion, all the insurance money came within the provisions of section 83, I think the plaintiff's motion should be dismissed, with costs.

In considering the question as to the applicability of the Act to machinery in a mill, the object of the Act must not be lost sight of, namely, to prevent arson and protect lives from being endangered by ill-disposed persons setting buildings on fire.

The Act 14 Geo. III. ch. 78, sec. 83, was considered in *Simpson v. Scottish Union Fire and Life Ins. Co.*, 32 L. J. N. S. Ch. 329, but that case is not of much assistance in determining this case.

GALT, J., concurred with ROSE, J.

---



## [COMMON PLEAS DIVISION.]

## REEVE V. THOMPSON ET AL.

*Landlord and tenant—Severance of reversion—Apportionment—Tenancy from year to year—Notice to quit.*

In July, 1880, M. conveyed certain lands to plaintiff which were embraced in lands of which the defendant was tenant from year of M. under a tenancy since 1868. In December, 1880, the plaintiff executed in favour of M. what purported to be a statutory lease of the lands conveyed to him at a yearly rent of twenty cents. The *habendum* was during the term of the occupancy as tenant of the lessee of said George Thompson, the defendant, "of the lands leased to him, the said term to be computed from the 2nd July, 1880, and from thenceforth next ensuing and fully to be complete and ended as soon as the said G. T. shall vacate the said premises or cease to reside thereon." The defendant continued to pay rent to M., and never was called upon to attorn or to pay rent to the plaintiff, and received no notice to quit from M. prior to action brought, and no demand of possession from plaintiff until about the commencement of this action. M. required an undertaking from plaintiff not to disturb defendant while he continued her tenant, and informed defendant of this lease, and that he should have undisturbed possession while he paid rent to her. The defendant claimed title under M., and contended that the conveyance did not affect his rights under his lease.

*Held*, that the lease by plaintiff to M. did not operate as a lease for years owing to the uncertainty of the termination thereof; but would be a tenancy at will until payment of rent when it would be a tenancy from year to year; and also might be deemed an agreement fixing the annual value of the premises at twenty cents, which M. should collect from the defendant and pay over to the plaintiff.

*Held*, also, that on the conveyance by M. to plaintiff there was a severance of the reversion, and the rent became apportionable at common law, but the concurrence of the defendant was necessary, or apportionment by a jury; and that it might not be unfairly assumed that there was such concurrence, and that defendant paid the twenty cents to M. for plaintiff, becoming thereby tenant from year to year to plaintiff, and entitled to six months' notice to quit; or that M. paid the rent to plaintiff and became tenant from year to year to plaintiff; and she receiving rent as theretofore from defendant he was as against or under her entitled to the benefit of such term, and either she or defendant to the six months' notice.

The defendant was therefore held entitled to possession until he received the proper notice to quit.

THIS was an action for possession of lands tried before Rose, J., without a jury, at Kingston, at the Spring Assizes of 1887.

The defendant claimed under a lease from Martha Moyle. He further claimed to be paid for the use and occupation of a portion of his premises that the plaintiff had taken

possession of; and also for a room in his house which he had allowed the plaintiff to occupy.

*Walkem*, Q.C., for the plaintiff.

*McGuire*, Q.C., and *Machar*, for the defendants.

The learned Judge reserved his decision, and afterwards delivered the following judgment, in which the facts fully appear :

April 16, 1887. ROSE, J.—The lands for which the action was brought were conveyed to the plaintiff by one Martha Moyle in July, 1880, by a deed in the statutory form.

At the time of the conveyance the defendant was tenant of certain lands under Martha Moyle, which lands embraced the lands in question. Although father and son are joined as defendants, for convenience I will treat the facts as if the father alone were made defendant.

The tenancy was from year to year, and had continued since 1868.

I find as a fact that the defendant had no knowledge of the conveyance to the plaintiff at the time of its being made. I am not certain when he obtained that knowledge. Very possibly it was prior to the plaintiff occupying the portion of the premises in question, although I am not at all able to find that to be the fact. That occupancy I find to have been by agreement without any rent named, and not in assertion of any right by the plaintiff to enter upon the premises.

On the 30th of December, 1880, the plaintiff executed what purported to be a “statutory lease” of the premises in question to Martha Moyle. The *habendum* was “during the term of the occupancy as tenant of the lessee by said George Thompson of premises on King street, belonging to said lessee. The said term to be computed from the 1st day of July, A.D. 1880, and from thenceforth next ensuing and fully to be complete and ended as soon as the said

George Thompson shall vacate the said premises or cease to reside thereon."

The rent reserved was 20 cents, payable on the 1st of July in each and every year.

The language employed leaves room for the discussion which took place at the Bar, as to its exact meaning; but, whatever its meaning, the instrument failed to operate as a lease for years, owing to the uncertainty in the ending of the term. See *Bacon's Abr.*, Tit. Leases, L. 3; *Doe d. Warner v. Browne*, 8 East 166; *Wood v. Beard*, 2 Ex. D. 30.

I think, having reference to the *habendum* and covenants, it should be held that the period of the lease was during occupancy and residence.

The defendant continued to pay rent to Martha Moyle, and never was called upon to attorn or pay rent to the plaintiff, and received no notice to quit from Martha Moyle prior to action brought, and no demand of possession from the plaintiff until about the date of commencing the action.

The defendant and plaintiff had, in the fall of 1886, some dispute about the plaintiff's boundary lines; but I do not find as a fact that the defendant disputed the plaintiff's title, for, so soon as the description was explained to him, he at once conceded that the plaintiff's deed covered the land in question.

What I desire to express is, that, so soon as he understood the description in the deed, he did not raise any contention as to the plaintiff's title; and any discussion between the plaintiff and defendant as to the line arose from an honest misunderstanding as to the effect of the description.

The defendant did, and does assert, his title under his holding from Mrs. Moyle; and claims that the conveyance to the plaintiff did not affect his rights or give the plaintiff any right to enter upon the land in question.

There certainly has been no acknowledgment of the plaintiff as his landlord.

It will be seen that Mrs. Moyle, by the conveyance to the plaintiff, severed the reversion in the premises held by the plaintiff.

It is argued on behalf of the plaintiff that from the nature of an estate from year to year, namely, a lease for a year certain with a growing interest during every year thereafter *springing out of the original contract and parcel of it*—See *Cattley v. Arnold*, 1 J. & H. 651, at pp. 660-1—when the landlord severed the reversion, conveying a portion of the land to a stranger, it became impossible for a further term or tenancy or interest to spring out of the original contract.

It was argued that if it could, then who was to give the notice to quit, who was to distrain, who could bring an action for the rent; for if the springing of the interest continued from year to year, the term would always be one and entire, and the rent one and entire.

The defendant's counsel said that by the severance of the reversion the right of distress was gone, and that possibly both might join in giving notice to quit.

If necessary to consider the right to recover the rent by action on a parol demise prior to apportionment, it may be found that the landlord may maintain such action even after the severance of the reversion.

On the whole I have come to the conclusion that the tenancy from year to year came to an end either upon the expiry of the current year, or, if the right to the six months notice was an indefeasible right, then at the end of the year next ensuing.

I have come to this conclusion with some doubt; but I do not see how, after the severance of the reversion, an undivided term or interest can spring from such severed parts.

The argument of Chitty in *Bliss v. Collins*, 5 B. & Al. 876, p. 883 may be referred to as raising questions for consideration.

The question as to whether the term ended upon the expiry of the current or next ensuing year is not of importance here, as some six years had elapsed between the conveyance to the plaintiff and the date of the commencement of this action.



I have, however, come to the conclusion that when the reversion was severed the rent became apportionable at common law. See *West v. Lassels*, Cro. Eliz. 851; *Collings and Harding's Case*, 13 Co. R. 578, Cro. Eliz. 606, 622.

*Bliss v. Collins*, 5 B. & Al. 876, decided that the concurrence of the tenant was necessary unless the apportionment was settled by a jury. See also *Cattley v. Arnold*, 1 J. & H. 660-1.

If the rent is apportionable, then the holding would be of each portion of the land under the owner of such portion; and, upon an apportionment, each landlord might thereafter have equal rights with the other as to his own portion; and it would follow that each, as to his portion, might by proper notice given to the tenant entitle himself to enter and take possession.

The case of *Mills v. Trumper*, L. R. 4 Ch. 320, shews that the rents under a parol lease are not apportionable under 11 Geo. II. ch. 19, or 4 & 5 Wm. IV. ch. 22.

By 29 Vic. ch. 28, sec. 4, provision was made in this country for giving to the assignee of part of a reversion the benefit of conditions and powers of re-entry; but such section only applies where "the rent or other reservation is *legally* apportioned."

37 Vic. ch. 10, (O.) provides that rent, &c., shall be considered as falling due from day to day, and shall be apportionable in respect of *time* accordingly, but does not provide for apportionment in respect of estate.

It would seem, therefore, as if it is still necessary to have the concurrence of the tenant or apportionment by a jury; and it may be that, without such apportionment, the tenancy from year to year would cease, and a tenancy at will spring up.

Was there evidence here of any apportionment by the landlord to the plaintiff and concurrence by the defendant?

The lease above referred to bears the same date as that of the registration of the deed; and I have no doubt from the contents of the document and the surrounding circumstances, that Mrs. Moyle required from the plaintiff an

undertaking not to disturb the defendant while he continued to occupy the premises on King street as her tenant. It was said that the use of the land in question was necessary to the defendant's full enjoyment of the remaining portion of the premises.

Although the document fails as a demise for years, yet, no doubt it operated to create a tenancy at will between the plaintiff and Mrs. Moyle until the payment of the rent when the tenancy would become a tenancy from year to year.

I think it may be looked at further as an agreement between Mrs. Moyle and the plaintiff, that the annual value of the premises in question should be *fixed* at the sum of 20c., and that Mrs. Moyle should collect that sum from the defendant as rent of such premises and pay it over to the plaintiff.

The defendant, in his examination before the Master, stated that Mrs. Moyle told him she had conveyed the premises in question, and had taken back a lease of such portion which assured him undisturbed possession so long as he paid his rent to her. He further stated that she told him nothing about rent being payable to Reeve under the lease ; but I think he must be taken to have had notice that some rent was payable when he was told that the document was a lease.

The date of this conversation is not given, but I think was prior to October, 1886.

I think therefore, that the conclusion may not unfairly be drawn that the rent was apportioned with the concurrence of the tenant, and that since the date of the lease he has been paying 20c. a year as rent thereof, such payment being made to Mrs. Moyle under agreement with the plaintiff, and for him, the plaintiff.

In such event the defendant became a tenant from year to year under the plaintiff, and was entitled to receive from him six months notice to quit.

Or, possibly it may be properly assumed that the rent was paid by Mrs. Moyle to the plaintiff under the lease,

in which event she became a tenant from year to year under the plaintiff, and receiving rent from the defendant, as theretofore, the defendant was, as against her or under her, entitled to the benefit of such term. In such event the plaintiff could not eject either Mrs. Moyle, or the defendant holding under her, without giving the six months notice.

I think I should strive to give effect to what was agreed between Mrs. Moyle and the plaintiff, as evidenced by the lease of the 30th December, 1880, and which agreement was communicated to the defendant by Mrs. Moyle, so that he had the right to rest upon its terms being carried out.

The plaintiff's wife stated at the trial that her husband had, since the action began, as I understood her, purchased the premises now occupied by the defendant; and it was proved that, on the 31st of March last, Mrs. Moyle served a notice to quit on the defendant, requiring possession on the 1st of October next, so that no doubt the plaintiff will soon accomplish his purpose of dispossessing the defendant.

While I do not feel justified in giving the plaintiff possession, I am equally unable to allow the defendant anything for use and occupation of the room held by the plaintiff, prior to demand by the son. I believe he did not intend to charge anything, but that he allowed the use of the room as a neighbourly act. Since the refusal to give up possession I think the plaintiff should pay for use and occupation. I allow for such use \$15; and the defendant is entitled to an order for possession.

Judgment will therefore be entered, declaring that the defendant is entitled to possession until he receive proper notice to quit; and dismissing the action, with costs; and further directing the plaintiff to pay the defendant \$15 for use and occupation, and deliver up to the defendant possession of the portion of the premises occupied by him.

The case of *Hare v. Proudfoot*, 6 O. S. 617, referred to by Mr. Machar is of interest. There, however, the demise was by deed.

## [QUEEN'S BENCH DIVISION.]

## REDDICK V. THE SAUGEEN MUTUAL FIRE INSURANCE COMPANY.

*Fire insurance—Construction of conditions—Addition to—“Unjust and unreasonable”—Concealment in application—Fraud and proof of loss.*

The plaintiff sued the defendants to recover the amount of a loss in respect of a dwelling house. The policy sued on, besides being subject to the statutory conditions, had indorsed on it, in the manner prescribed by the statute, several additions to such conditions, one of which was as follows: “Statutory condition No. 1 is added to” as follows:

- (1) “Provided that any fraudulent misrepresentation contained in the application for insurance, or (2) any false or incorrect statement respecting the title or ownership of the property or the circumstances of the applicant, or (3) the concealment of any mortgage, or execution, or any incumbrance on the insured property or on the land on which it may be situate, or (4) the failure to notify the company of any change in the title or ownership of the insured property, or of the creation of any incumbrance thereon or upon the land upon which the same is situate, and to obtain the written consent of the company thereto, shall render this policy void; and no claim for loss shall be recoverable hereunder unless the board of directors, in their discretion, shall see fit to waive the defect.”

The land on which the house stood was charged with the maintenance of the plaintiff's father during his life. This charge was not disclosed by the plaintiff in his application for insurance, and such non-disclosure was not in any way explained.

*Held*, 1. That such non-disclosure was a concealment of an incumbrance within the meaning of the third branch of the addition.

2. That the concealment need not necessarily be designed or intentional in order to void the policy.

3. That the first statutory condition applied only to the physical risk, and did not apply to matters of title.

*Klein v. Union Fire Ins. Co.*, 3 O. R. 234, followed.

4. That the second and third branches of the addition were unjust and unreasonable in not providing that the matter falsely or incorrectly stated or concealed should be material to be made known to the company.

5. That although the Judge at the trial had not held or been asked to hold this condition not just or reasonable the Court before which a question relating thereto was pending could do so.

The plaintiff did not in his declaration of loss disclose the incumbrance in favor of his father. The jury did not find nor were they asked to find that there was any fraud or false statement in the plaintiffs statutory declaration.

*Held*, that fraud or a wilful false statement should have been proved, and that it was not the place of the Court to infer it.

## STATEMENT of claim:

- (1) That plaintiff was a manufacturer in Mount Forest.
- (2) That defendants were a company duly incorporated under 36 Vic, ch. 44 (O.), and amendment thereto, and



carried on the business of Fire Insurance in the Province of Ontario, with their Head Office at Mount Pleasant. (3) That by policy of insurance, No. 3801, duly executed by the defendants, and dated 31st December, 1885, in consideration of an undertaking by the plaintiff to pay the sum of \$31 to the defendants as and when the same should be lawfully assured, and demanded of him by the defendants, insured the plaintiff against damage or loss by fire in various sums on several properties, and amongst others on a certain building, being a stone dwelling and frame addition thereto, situate on the second division of lot 22, in the first concession of Normanby, to the extent of \$500, from 31st December, 1885, to 31st December, 1888, subject to the terms and conditions on the said policy set forth. (4) That plaintiff duly paid all lawful assessments and demands made on him in respect of said undertaking to the defendants when and so often as the same were demanded. (5) That on or about the 29th April, 1886, and while said policy continued in full force and effect, said building was damaged and destroyed by fire. (6) That plaintiff at the time of the making of said policy, and from that time continually until the happening of said fire, was interested in said stone building and frame addition thereto, so insured as aforesaid, to the amount for which the same was required under said policy. (7) That the loss to plaintiff, by reason of said fire, was loss by fire within the meaning of said policy, and all things had happened, and all times had elapsed necessary to entitle plaintiff to be paid said sum of \$500 by defendants, but defendants had not paid the same or any part thereof.

The defendants by their statement of defence (1) admitted the statement made in paragraphs 1 and 2 of the statement of claim, and (2) denied all the other statements. (3) They alleged that said policy was subject to the statutory conditions set forth in the Act called the Fire Insurance Policy Act, which were duly endorsed thereon. (4) They set up the statement by plaintiff in his application, that the building insured was occupied by himself and his

tenants, when it was in fact vacant and unoccupied, as a breach of the first statutory condition. (5) They set up that the building insured became vacant and unoccupied after the policy was effected; and that this was a change material to the risk, and was not promptly notified in writing to the company or its local agent, and so was a breach of the third statutory condition.

6. That this change avoided the policy under R. S. O. ch. 161 sec. 42.

7. Breaches of seventh statutory condition.

8. They set up, in support of the fifteenth statutory condition, that plaintiff falsely and fraudulently stated in his statutory declaration that the fire did not originate by any act, design, or procurement on his part, nor in consequence of any fraud or evil practice done by him, and that nothing had been done by or with his privity or assent to violate the conditions of insurance or render the policy void, which said statement was false and fraudulent within the meaning of said condition in this respect, that said fire did in fact originate by some act, design, or procurement on the plaintiff's part, or in consequence of some fraud or evil practice done by him, and something had in fact been done by plaintiff, or with his privity or consent, to violate the condition of insurance aforesaid and render the policy void, whereby said alleged claim became vitiated.

9. That plaintiff was not at the time of the alleged loss interested in the property destroyed to the amount assured to the amount of his said claims or at all.

10. That the said policy was also subject to the following conditions, namely, that any fraudulent misrepresentations contained in the application for insurance, or any false or incorrect statement respecting the title or ownership of the property or the circumstances of the applicant, or the concealment of any mortgage or execution, or any encumbrance on the insured property or on the land on which it was situated, should render the policy void; and defendants said that in the application and policy plaintiff

caused said building and the land on which it stood to be represented as being encumbered by a mortgage of \$1,500 only, whereas they were, in addition thereto, charged with certain encumbrances particularly set forth in a certain conveyance made by Mary Jane Reddick and John Reddick to Robert Reddick, dated October 15th, 1870, whereby the plaintiff made a false or incorrect statement respecting the title or ownership of the property, or concealed an encumbrance on the insured property within the meaning of the above condition, whereby the said policy became void.

11. And respecting the statements made in the last preceding paragraph defendants said that, aside from said express condition for avoiding said policy in said case, said representation of plaintiff that said property was unencumbered save as aforesaid was a material allegation, and that relying upon the truth thereof defendants entered into said contract, and that said allegations being untrue to the knowledge of plaintiff, and having been falsely and deceitfully made by plaintiff for the purpose of inducing defendants to enter into said contract, said policy was void.

12. That said policy was also subject to the further condition, amongst others expressed therein, that any person entitled to make a claim under said policy was to furnish therewith, amongst other things, a statutory declaration declaring, amongst other things, the particulars of all encumbrances on the property insured and destroyed, and in respect to which such claim was made, if any, and that any fraud or false statement in a statutory declaration in relation thereto should vitiate the claim; and defendants said that with the claim put in to defendants by plaintiff under said policy, upon which said claim was based, plaintiff furnished a statutory declaration declaring that said buildings and the lands upon which they stood were encumbered to the amount of \$1,500 only, stating nothing as to any further encumbrance; whereas, as the fact was, the same were further encumbered as set out in paragraph five thereof, whereby said claim became vitiated.

13. That, repeating what was said in paragraph eight, as to said conditions and statutory declaration, said declaration so furnished contained the further false statement that said property so insured belonged at the time of the fire solely to plaintiff, the insured, and that there was no other party interested therein, whereby also said claim became vitiated.

Plaintiff joined issue and in reply said that at the time of effecting the insurance in the statement of claim mentioned he went to the head office of the defendant company and applied to one Henry L. Drake, the general manager and secretary and chief executive officer, to effect said insurance, and informed said Drake of the amount for which he wished the said property insured, and gave said Drake all the information he asked for in respect of said property, and plaintiff there and then told said Drake, as the fact was, that said dwelling house was vacant and unoccupied, and said Drake filled up the whole of said application, and plaintiff signed the said application without reading over the same, and plaintiff was not aware that said application contained any inaccurate or incorrect statement until after the happening of said loss: that plaintiff did not know, at the time of the signing the said application, that the same contained a provision that any person filling up said application would do so as the agent of plaintiff, and not as the agent of the company, nor did plaintiff know that defendants intended to make said application a part and condition of said insurance contract or policy, nor had plaintiff any actual knowledge thereof as being a part and condition of the contract until after the loss, by reason whereof defendants ought not to be allowed to plead the matters set forth in the fourth paragraph of the statement of defence. (3) And plaintiff further said that if it should be held that said application for insurance formed part and was a condition of said contract of insurance, as in the fourth paragraph of the statement of defence set forth, the same was not just and reasonable to be exacted by defendants in so far as it pur-



ported to make said Drake the agent of plaintiff and not of defendants in filling up said application, or to bind plaintiff by the acts or omissions of said Drake. (4) The plaintiff further replied to the seventh paragraph of defendants statement of defence, but as nothing turned upon that paragraph his replication need not be set out.

#### Issue.

The cause was tried at the last sittings of this Court at Guelph, before Cameron, C. J., and a jury, and the following facts necessary for the determination of the case appeared :

Plaintiff's application for insurance was filled up by Drake, the General Manager and Secretary of defendants, and was for insurance against loss or damage by fire or lightning, commencing 31st December, 1885, and ending 31st December, 1888 :

- (1) On the ordinary contents of a dwelling  
(while contained in a former rough-cast  
dwelling owned by James Brown and situ-  
ated on lot 12, east side of Main street, held  
by the owner, not encumbered, and not  
otherwise insured.) .....\$300
- (2) On stone dwelling house and frame addition  
thereto ..... 500
- (3) On frame barn and stables ..... 400
- (4) On the ordinary contents of barns and sta-  
bles contained therein ..... 300
- (5) On hewed cedar log blacksmith's shop ..... 65
- (6) On tools of trade, as blacksmith, therein.... 65

In event of loss the amount equitably or justly found due on items 5 and 6 was to be paid to A. Reddick, John and James Reddick, as their respective interests might appear—situated on the 2nd division of lot 22, concession one, township of Normanby, county of Grey, Ontario, and occupied by applicant and tenant for above purposes, and held by the assured by (or as) deed, and being not otherwise insured, and being encumbered \$1,500.

The following provision was at the foot of the application: "I hereby covenant and agree with the said company that the foregoing is a just, full, and true statement of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to me and are material to the risk, and that the annexed diagram (if any) shows all buildings or combustible materials within 100 feet of the property proposed for insurance, and the special survey (if any), signed by me and attached hereto, is substantially correct, and I hereby agree and consent that the same be held to be the basis of the liability of the said company, and shall form a part and be a condition of this insurance contract. It is further agreed that any person filling up or completing this application does so as my agent, and not as the agent of the company."

The plaintiff was a literate man, and was a director of the defendant company, and signed the application with his own hand.

The policy issued by the defendants bore date 31st December, 1885, and insured the property for the time and to the respective amounts mentioned in the application. The policy had endorsed thereon the statutory conditions, and the following, among others, headed—"Variations in conditions": "1. Statutory condition No. 1 is added to as follows: Provided that any fraudulent misrepresentation contained in the application for insurance, or any false or incorrect statement respecting the title or ownership of the property or the circumstances of the applicant, or the concealment of any mortgage or execution, or any incumbrance on the insured property or on the land on which it may be situate, or the failure to notify the company of any change in the title or ownership of the insured property, or of the creation of any incumbrance thereon or upon the land upon which the same is situate, and to obtain the written consent of the company thereto, shall render this policy void; and no claim for loss shall be recoverable hereunder unless the board of directors, in their discretion, shall see fit to waive the defect."

“ 5. Statutory condition No. 13 is varied by adding after (4) the words (5), the ‘particulars of all incumbrances, if any,’ also, in (d) after ‘invoices’ add, ‘or copies thereof in case the same shall be destroyed.’ (f) He is also, if required, to submit to examination under oath or affirmation before a justice of the peace, or other person having lawful authority to administer an oath or affirmation in any legal proceeding, touching the loss for which he makes claim.”

The stone dwelling house and frame addition thereto insured by the defendant company, and situate on the 2nd division of lot 22, con. 1, township of Normanby, were destroyed by fire on 29th of April, 1886.

By deed, made 15th October, 1870, by Mary Jane Reddick, and John Reddick, her husband, the said parties conveyed said land to said Robert Reddick in fee simple, subject to a maintenance to be provided by him for them, which he covenanted to provide.

By deed, made 14th March, 1871, said Robert Reddick conveyed to plaintiff in fee, subject however to the terms and conditions contained in the before mentioned deed.

At the same time that Mary Jane Reddick and John Reddick conveyed said land to Robert Reddick they conveyed the fifty acres of land adjoining it, being composed of the third division of said lot number 22, to plaintiff in fee, by a similar deed for a like consideration and containing like covenants and provisions for the payment of a like sum yearly to them, or the survivor of them. Plaintiff then became the owner of the second and third divisions of said lot, subject to the yearly payment of \$125 to his father and mother, John and Mary Jane Reddick, and to the survivor of them. Plaintiff's mother, Mary Jane Reddick, died, and plaintiff, his father, joining in the mortgage, mortgaged both said divisions of said lot to the Guelph and Ontario Savings and Investment Society for \$1,500, with interest at seven per cent. per annum.

This was the condition of plaintiff's title at the time of the application for the policy sued on.

Plaintiff was asked by the general manager of the defendant company, when filling up the application, if the place was encumbered. "Q. What did you tell him? A. I told him yes, \$1500. Q. Did he put that down? A. I suppose so, I don't know. Q. Put it down in here? A. It is quite likely he put it down. He knew it was encumbered, anyhow, previous to that. Q. From the other applications that were there, I suppose; did you tell him about this claim of your father? A. No."

Plaintiff stated that the value of the land with the buildings was \$3,500 and that the annual sum for which he rented it was \$125. Plaintiff, in his statutory declaration as to his loss, stated "That the said property was encumbered to the amount of fifteen hundred dollars at the time of the fire."

There was no independent evidence given that the fact of there being an incumbrance upon the property in favour of plaintiff's father was material to be made known to the defendant company.

The jury found for plaintiff, and \$312 damages, and the learned Judge directed judgment for that amount, with costs of suit.

May 17th, 1887. *Osler, Q. C.*, obtained an order *nisi* calling upon the plaintiff to shew cause why the verdict and judgment should not be set aside, and a nonsuit entered, or judgment given for defendants, on the ground that paragraph ten of the statement of defence was clearly proved, and not met in any way by plaintiff; also, that paragraphs twelve and thirteen of the statement of defence were clearly proved, and not met in any way by plaintiff; or why said verdict should not be set aside and a new trial had between the parties, on the ground that the verdict was against law and evidence, and the Judge's charge, except upon the issue as to arson, upon which issue defendants did not move; and why the defendants should not be at liberty to argue their motion without filing copies of the shorthand notes of evidence.



May 28th, 1887, *Guthrie*, Q.C., (*J. B. Clarke* with him) shewed cause, and *Osler*, Q.C., (*Kingstone* with him) supported the order *nisi*.

September 8, 1887. ARMOUR, J.—The only oral evidence brought before us is the evidence of the plaintiff himself, and upon it and the documentary evidence and the charge of the learned Chief Justice, which is also brought before us, we have to determine the questions raised, which may be thus stated: (1) Is the bare fact of the non-disclosure by the plaintiff to the defendant company of the incumbrance on his property in favour of his father sufficient to defeat his claim? (2) Is the bare fact of the non-disclosure of such incumbrance by the plaintiff in his statutory declaration of his loss sufficient to defeat his claim?

The determination of the first of these questions must depend (1) upon the construction to be placed upon the addition made by the defendant company to the first statutory condition, and (2) upon the justice and reasonableness of such addition.

This addition is very awkwardly made by way of proviso to the first statutory condition and in ignorance of the proper effect of that condition, and seems to have been taken almost wholly from 36 Vic. ch. 44, sec. 36 (O.)

It provides that the policy shall be rendered void, (1) by any fraudulent misrepresentation contained in the application for insurance; (2) by any false or incorrect statement of the title, or ownership of the property, or the circumstances of the applicant; (3) by the concealment of any mortgage, or execution, or any incumbrance on the insured property, or on the land on which it may be situate; (4) by the failure to notify the company of any change in the title or ownership of the insured property, or of the creation of any incumbrance thereon, or upon the land upon which the same is situate, and to obtain the written consent of the company thereto.

The non-disclosure by the plaintiff to the defendant company of the incumbrance on his property in favour of his father, if it comes within any, comes within the third branch of this addition.

The application called for the disclosure of it; the general manager of the defendant-company, who filled up the application, interrogated the plaintiff as to the incumbrances on his property, and although he disclosed the mortgage to the Guelph and Ontario Savings and Investment Society, he omitted to disclose the incumbrance in favour of his father, and at the trial he gave no reason for or explanation of his omission to disclose it. Such non-disclosure was, in my opinion, a concealment of such incumbrance within the third branch of this addition.

In discussing the proviso to 36 Vic. ch. 44, sec. 36, from which this addition was taken, in *Sinclair v. Canadian Mutual Ins. Co.*, 40 U. C. R. 206, this Court suggested that concealment must be fraudulent in order to avoid the policy; I presume by "fraudulent" meaning "designed" or "intentional;" but I do not so think, for the concealment is equally prejudicial to the insurers, whether intentional or unintentional.

Then, is this third branch of the addition just and reasonable?

If the first statutory condition applied to title, I would have been of the opinion that the third branch of this addition was unjust and unreasonable, in accordance with the view I expressed in *Parsons v. The Queen Insurance Company*, 2 O. R. 45, in dealing with a subject matter that the Legislature had dealt with, and in imposing a more onerous condition upon the insured in respect to it than the Legislature had deemed just and reasonable to be imposed by not providing that the matter concealed should be material to be made known to the company.

The "risk" referred to in the first statutory condition is the physical risk, not the moral risk, the danger from or exposure to accidental fire, not the danger from or

exposure to intentional fire; and hence "any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes," does not include circumstances of title, which are only material in respect of the moral risk. That this is the true construction is the more apparent from the latter part of the condition, making the insurance of no force "in respect to the property in regard to which the misrepresentation or omission is made;" for if circumstances of title were intended in the words quoted, a man with a mortgage on his farm might insure his barn and its contents, conceal the mortgage from the insurers, and in case of fire, although unable to recover the insurance on his barn, yet recover it on its contents; and it was decided that he could do so by the Common Pleas Division, in *Goring v. The London Mutual Fire Insurance Co.*, 10 O. R. 236, the attention of that Court not having been called to the decision of the Chancery Division, in *Klein v. The Union Fire Insurance Company*, 3 O. R. 234.

In *Sauvey v. The Isolated Risk Insurance Co.*, 44 U. C. R. 523, I expressed the opinion that the first statutory condition had no reference to title at all, and I founded that opinion upon my reading of the condition, and upon the opinion of the Court of Appeal upon a somewhat similar condition in *Samo v. Gore District Mutual Ins. Co.*, 1 A. R. 568. See also *Williamson v. The Commercial Union Assurance Co.*, 25 C. P. 453; *S. C.*, in Appeal, 26 C. P. 591.

In *Wilby v. Standard Ins. Co.*, 3 O. R. 115, the Chief Justice said: "It appears to be conceded that the first of the statutory conditions as to the omission to communicate circumstances which are material to be made known to the company, in order to enable it to judge of the risk it undertakes, does not apply to matters affecting the title. I do not remember having been called on to give any judgment on this point, but I understand this construction to be generally accepted. The same construction also appears to be given to clause 3 as to any change material to the risk."

This question has, however, been put to rest, until an appellate Court shall disturb it, by the decision of the Chancery Division in *Klein v. The Union Fire Ins. Co.*, 3 O. R. 234, determining that the first statutory condition does not apply to matters of title.

I am of opinion, however, that both the second and third branches of this addition are unjust and unreasonable in not providing therein that the matter falsely or incorrectly stated or concealed should be material to be made known to the company.

In *Butler v. Standard Ins. Co.*, 26 Gr. 341, Spragge, C. in discussing a condition similar to the addition under consideration, said: "My opinion is, that if the proper construction of that non-statutory condition is that the policy is to be avoided by any incorrect statement, although it be not to the prejudice of the company, or material to be made known in order to enable it to judge of the risk it is undertaking, then, looking at the statutory condition and the policy thereby indicated, I should hold such condition not just and reasonable, and therefore null and void."

And in the same case, in Appeal, 4 A. R. 391, Patterson, J. A., said of the same condition: "That is not a statutory condition, but is one added by the company. It provides that if in the application, survey and diagram the assured make any erroneous or untrue representation or statement, or omit to make known to the company any fact material to the risk, or make any untrue statement respecting the title or ownership and the circumstances of the assured, or conceal any mortgage execution, or other encumbrance, or understate the amounts thereof on the said property, this policy shall be null and void. Part of this condition covers the same subjects to which the first statutory condition is addressed; but where the latter invalidates the insurance by reason of such misrepresentations or omissions only as are material to the risk, and invalidates it only in regard to the property to which the misrepresentation or omission relates, this added condition makes every erroneous or untrue



statement fatal, although the error or mistake may be utterly immaterial and fatal to the entire policy, although it may relate to a small part only of the property insured. In these particulars the learned Chancellor held that the condition was unjust and unreasonable. I have merely to add that, in my judgment, the Legislature had by anticipation done the same thing when the qualifying words were inserted in the condition given by the statute."

It was contended by the defendants that, inasmuch as the Judge before whom the question relating to this addition was tried, had not held nor been asked to hold this addition to be not just and reasonable, this Court could not do so, because this was not the Court before whom the question relating to this addition was tried within the meaning of the 6th section of the Fire Insurance Act; but the section is not to be so read, for the words "before whom," &c., refer to the Judge and not to the Court, and the section is to be construed in the same way as if it read, "by the Judge before whom a question relating thereto is tried or the Court."

I think, therefore, that the first question raised must be determined in the plaintiff's favour.

I think, also, that the second question raised must be determined in his favour; for the jury did not find, nor were they asked to find, and it is not our place to infer it, that there was any fraud or wilfully false statement in the plaintiff's statutory declaration of his loss by reason of his non-disclosure therein of the incumbrance in favour of his father; and the fifteenth statutory condition requires that there shall be either fraud or false (that is, wilfully false,) statement in the statutory declaration to vitiate the claim: *Mason v. Agricultural Mutual Ins. Co.*, 18 C.P. 19.

In my opinion, therefore, the order *nisi* must be discharged, with costs.

WILSON, C.J.—The first statutory condition which states that if any person insures his buildings or goods and describes the same otherwise than as they really are, or

misrepresents or omits to communicate any circumstance material to be made known to the company to enable it to judge of the risk it undertakes, seems to apply to the physical condition and situation of the property, including in that the fact whether the buildings are occupied or are not occupied.

The condition requires the building or goods shall be the property of the applicant. That may be said to be satisfied by his having an *insurable* interest without setting out the particular nature of that interest or title.

In case the description is otherwise than as the buildings or goods really are, *to the prejudice of the company*; or in case the misrepresentation or omission to communicate is of any circumstance *material to be made known to the company to enable it to judge of the risk it undertakes*, the insurance, but only in respect to the property in regard to which the misrepresentation or omission is made is avoided. The condition does not require fraud, nor a wilful nor intentional purpose to be shown in giving the misdescription, or in making the misrepresentation or omission: it is sufficient to avoid the insurance *pro tanto* that there is in fact a misdescription to the prejudice of the company, or a misrepresentation or omission of any circumstance material to the company to have known.

The question of vacancy of the building was found by the jury, I presume, to have been communicated by the plaintiff to the company, although it is surprising they should have found it in the face of the application which, though filled up by the insurance officer, states in express terms that it was occupied by the plaintiff and his tenants, and that could not have been so stated without the knowledge of the plaintiff, although he swears to the contrary.

The only other question is upon the variation to the first condition. The variation is by way of addition to the condition, "Provided (a) that any fraudulent misrepresentation contained in the application for insurance, or (b) any false or incorrect statement respecting the title or ownership of the property or the circumstances of the

applicant, or (c) the concealment of any mortgage or execution or any encumbrance on the insured property, or on the land on which it may be situate \* \* \* and to obtain the written consent of the company thereto, shall render that policy void \* \* \* .”

It is objected to this variation that a breach of any part of it did not avoid the policy, although the matter of it was to the prejudice of the company, and although the matter of it was “material to be made known to the company to enable it to judge of the risk it undertakes,” because the variation does not in terms limit the operation of the variation in like manner as the statutory condition is limited; and the variation is thus made more onerous, it is said, than the condition, and the Court must therefore hold it to be null and void under the R. S. O. ch. 162, sec. 6, to be “not a just and reasonable condition,” to impose upon the insured.

Is the variation more burdensome to the insured than the original condition; and, if it is, should it be declared to be not a just and reasonable condition?

These are, in my opinion, two several subjects of enquiry.

The Act says: “In case any policy is entered into containing or including any condition other than or different from the conditions set forth in the schedule to this Act, if the said condition so contained or included is held by the Court or Judge before whom a question relating thereto is tried to be not just and reasonable, such condition shall be null and void.”

The Act does not say, if the variation or added condition is different or even more onerous than the statutory conditions it shall be void; but if it be different (or more onerous, I will add,) and if the Court or Judge before whom the matter is tried *holds it to be not just and reasonable*, it shall be null and void.

The Act has not said the statutory conditions shall be a conclusive declaration of what conditions shall be just and reasonable, and that every condition which is contrary to them shall be void, for there may be a necessity to make

provision for some matter which the Legislature did not know and could not provide for, and which may be more burdensome than the conditions they have enacted, and which may nevertheless be quite just and reasonable, and be so held by the Court.

The first part of the variation relates to any fraudulent misrepresentation being contained in the application for insurance, and it declares if there be the policy shall be void. Does that apply to any part of this case? It applies to the life rent in favour of the father of the plaintiff.

The application states the property insured was encumbered to the extent of \$1,500. That was a misrepresentation, for the plaintiff knew it was encumbered in addition with the yearly rent charge of \$62.50.

Should the variation then have alleged, according to the original condition, that it was made in respect to a circumstance material to be made known to the company to enable it to judge of the risk?

I am of opinion it was not necessary. The statutory condition covers even the unintentional and accidental misrepresentation of matters which should be communicated to the company. The variation relates to *fraudulent* misrepresentations only, and it does not make the original condition more onerous, for the two conditions relate to different purposes and acts: the fraud referred to is fraud in fact, which could be repelled by shewing the misrepresentation could not possibly affect the company in any way. The 10th paragraph of defence does not, however, rely upon the *alleged fraud*, but upon the falsity and incorrectness of the statement, which is the second part of the variation referred to below.

As to the second part of the variation relating to the false or incorrect statement respecting the title or ownership of the property. These are matters not covered by the statutory condition; and although it is not quite clear that it would be required to impart from that condition the limitations, that the false or incorrect statement was



to the prejudice of the company, or was a circumstance material to be made known to it, I am of opinion it was necessary to repeat in that part of the variation the limitation that the false or incorrect statement was of a nature or matter it was material to have been communicated to the company.

There are many matters of title which are of no kind of consequence how they may be for insurance purposes. It is of no moment whether a person owns the house which is insured for a year or two in fee or for ninety-nine years to come, nor that it is mortgaged for a tenth of its value. In other cases the title may be of great importance. It is not unreasonable, therefore, to require that the company shall stipulate that the policy shall only be affected when matters of title or ownership are material to be made known to the company; and that the company should shew how and in what manner and to what extent it was or is under the circumstances material to have been communicated.

The third part of the variation relates to the concealment of any mortgage, execution, or incumbrance on the property insured or on the land on which it may be situate. The *concealment*, although the term is used in a bad sense, expressing a purpose and design to withhold such matters from the knowledge of the company; yet it may be the matter concealed was, and is of so little consequence or of so little value that it would not and could not, if it had been disclosed, have made any difference in the acceptance of the risk, and therefore the variation of the statutory condition should have provided, as the condition had done, that the policy should be invalidated only in case the concealment was a matter which it was material that the company should have known.

The last part of the variation cannot be supported as it stands, for want of an allegation that the concealment was of a matter which was material to have been made known to the company.

No insurance company has yet counter-claimed, if it can do so, for any deceit or fraud practised upon it, although the policy may not be subject to be wholly forfeited or

avoided by reason of it. It is said the purchaser of land may do so when he loses the benefit of his bargain, although he cannot recover such damages in an action upon his contract, when the purchase fails by reason of the defective title of the vendor: *Sikes v. Wild*, 1 B. & S. at p. 594; *Bain v. Fothergill*, L. R. 7 H. L. at p. 207.

The case on the merits has not been satisfactorily disposed of, but we are not able to interfere, for the issues were properly for the jury to try, so long as such matters must be tried by a jury. The system is a very imperfect one. Its failures and defects are well known and are frequently commented upon. Much has been done to establish another mode of trial, but sufficient has not been done yet. The principle of trial by jury is that a man shall be tried by his peers or equals, but the parties in many cases do not stand on a par or equality before a jury. I do not refer to wealth or station, although these have much to do with it; nor do I refer to sex, although in all cases but dower, which action touches the jury themselves, there is usually favour shown to the woman. I refer more particularly to those actions against companies and corporations.

In such actions it cannot be pretended they stand on a par or equality with their opponents before a jury. I will make just one quotation. Lord Bramwell, in *Abrath v. North Eastern R. W. Co.*, 11 App. Cas. p. 252, said: "Every one listening to me knows the only reason a railway company is selected for an action of this sort is, that a jury would be more likely to give a verdict against a company than against an individual," &c.

The other cases I mention are equally strong in their language. *Toomey v. London, &c., R. W. Co.*, 3 C. B. N. S. 146; *Great Western R. W. Co. v. Rimell*, 18 C. B. p. 585; *Moon v. Towers*, 8 C. B. N. S. p. 616, and many others, could be cited.

I am obliged to agree that the motion must be dismissed, and with costs.

O'CONNOR, J., agreed that the motion must be dismissed.

*Order nisi dismissed, with costs*

## [CHANCERY DIVISION.]

## REGINA V. BRIERLY.

*Criminal law—Bigamy—British subject resident in Canada contracting second marriage abroad—R. S. C. ch. 161, sec. 4—Ultra vires—Constitutionality—Repugnancy to Imperial legislation—Dominion Parliament—Proof of foreign law—Proof of second marriage.*

*Held*, that R. S. C. ch. 161, sec. 4, which enacts that every one who being married marries any other person during the life of the former husband or wife whether the second marriage takes place in Canada or elsewhere is guilty of felony, provided that the person who contracts such second marriage is a subject of Her Majesty, resident in Canada, and leaving the same with intent to commit the offence, is not *ultra vires* the Dominion Legislature either as being repugnant to Imperial legislation or on any other grounds.

*Per* BOYD, C.—This statutory law is nearly half a century old; it has been confirmed by the Court, past upon more than once by competent Colonial Legislatures and ratified by the express sanction of the Imperial Parliament and Her Majesty in person.

In order to prove the second marriage which took place in Michigan, the evidence of the officiating minister was tendered who showed that during the last twenty-five years he had solemnized hundreds of marriages, that he was a clergyman of the Methodist Church, that he understood the laws of Michigan relating to marriage, that he had been all the while resident in Michigan, that he had had communications with the Secretary of State regarding these laws, and that this so called second marriage was solemnized by him according to the marriage laws of that State.

*Held*, that this evidence was admissible in proof of the validity of the second marriage, and was sufficient proof of the same, even assuming that such ought not to have been presumed.

*Per* BOYD, C.—In the case of a second marriage it is not essential to prove the foreign law where British subjects are concerned, as in this case.

*Regina v. Griffin*, 14 Cox, C. C. 308, followed.

THIS was a case reserved for the opinion of the Chancery Division of the High Court by the Chairman of the Court of General Sessions of the Peace for the county of Middlesex, on the trial of Alfred Brierly for bigamy, which took place on June 10th, 1887.

The indictment, which was under R. S. C. ch. 161, sec. 4, stated that Brierly on October 20th, 1880, at London, in this Province, married Mary Allen, spinster, and her then and there had for his wife, and afterwards, while so married, on April 27th, 1887, at Port Huron, in the State of Michigan, one of the United States of America, feloniously

and unlawfully married and took to wife Jessie Baker, and that he was at the time of his committing the said offence a subject of Her Majesty, resident in the Dominion of Canada, and that he then left the said Dominion with intent to commit the said offence, and afterwards, on April 30th, 1887, was apprehended at London, in this Province, and was now in custody in the common gaol there for the aforesaid felony.

As to the evidence for the Crown, it is sufficient for the purposes of the present report to state that besides Jessie Baker, who deposed to the fact of her marriage at Port Huron, the Rev. Dr. Campbell, who performed the ceremony of the second marriage at Port Huron, was tendered to prove the said marriage, and that he was legally authorized to solemnize marriage there, and did solemnize the marriage in question according to the laws of Michigan, and the evidence was taken subject to the objection of counsel for the prisoner. The evidence given by this witness is sufficiently stated in the judgments, *infra*.

No evidence was offered for the defence, but counsel for the prisoner took the following objections:

1. That no offence was proved to have been committed by the prisoner. That the alleged second marriage took place in Michigan, and that the Dominion Parliament has no authority to pass an Act making the contracting of a second marriage in a foreign country a crime.
2. That there was no competent evidence to prove the second marriage in accordance with the laws of the State of Michigan.
3. That the question whether the ceremony performed by the witness Campbell at Port Huron was a valid marriage, was a question of foreign law. That the witness Campbell was not competent to give evidence as to what the foreign law was, and that there was no sufficient evidence of the nature of the law in the State of Michigan as to the authority to perform the marriage there, or as to the other requisites of a valid marriage in the said State.
4. That the law of the State of Michigan applicable to the case being a written law ought not to have been proved by oral testimony.
5. That the evidence of the said Campbell as to the law of the State of Michigan ought not to have been received.
6. That there was no proof or sufficient proof that the prisoner had married another person during the life of his former wife, so as to constitute the offence of bigamy within the meaning of the statute in that behalf.



The jury found the prisoner guilty, but the Judge passed no sentence, reserving this case whether upon the evidence and the objections taken, the prisoner should have been found guilty of the said offence.

The case came up for argument on June 17th, 1887, before Boyd, C., and Ferguson and Robertson, JJ.

*W. R. Meredith*, Q.C., for the prisoner. At common law an act committed without the jurisdiction could not be a crime ; but see *In re Tivnan*, 5 B. & S., at p. 679, as to offence of a British subject committed in a foreign country. Mr. Campbell says the marriage was solemnized in every particular according to law, but he should have given particulars. As to the authority of the Parliament of Canada, no allegiance is due to the Sovereign as represented by the Dominion Government. It would not be within the competence of the Dominion Parliament to legislate that a British subject, not a Canadian, who committed bigamy in the States, had committed an offence here. In *Todd* Parl. Gov't. in the British Colonies, p. 129, it is laid down that local legislatures are clothed with authority to provide for the peace, order, and good government of the colony. In the absence of legislation there is no power to punish an offence committed without the jurisdiction. It is not necessary to make laws for the punishment of offences committed out of the country. The second marriage committed in a foreign country is not an offence against the peace, &c., of Canada. The offence is the contracting of this marriage. See Imp., Act 24 & 25 Vic. ch. 100, sec. 57. As to the question of the sufficiency of the evidence as to the Michigan marriage. See *Regina v. Henry Allen*, L. R. 1 C. C. R. 367 ; in this case *Burt v. Burt*, 2 Sw. & Tr. 88, 29 L. J. P. & M. 133, is spoken of and recognized as good law.

The Court here stopped Mr. Meredith and requested him to notify the Minister of Justice of the Dominion with

reference to the constitutional question, and the argument was adjourned to June 23rd.

On the case being again called on for argument on June 23rd, and it appearing that the Minister of Justice did not purpose intervening :

BOYD, C. — How has this Court power to interfere with Dominion legislation when not conflicting with Provincial rights ?

*Meredith.*—When there is a written constitution the Court has inherent jurisdiction to say whether legislation is within it. The Court could not give effect to any objection to an Act of the Imperial Parliament: *Maxwell* on the Interpretation of Statutes, 2nd ed., pp. 179, 180. See *Forsyth's* Cases and Opinions on Constitutional Law, pp. 465, 466, as to the right of the Court to entertain a question of this kind. There is no decision on this point. The citation from Forsyth is the opinion of the law officers of the Crown. See, also, *Wharton's* Treatise on the Criminal Law, 9th ed., sec. 271; *Dicey's* Law of the Constitution, p. 109; *Bowyer* on Universal Public Law, p. 328. *Riel v. Regina*, 10 App. Cas. 675, is distinguishable. As to *Regina v. Griffin*, 14 Cox C. C. 308, and the presumption that the foreign marriage is valid, that decision is not binding upon this Court. In *Regina v. Allen*, L. R. 1 C. C. R. 367, the Court refused to follow *Regina v. Fanning*, 17 Ir. C. L. 289; 10 Cox C. C. 411. *Regina v. Griffin* was not a unanimous judgment, nor did the Judges who were in the majority agree in their reasons. There is a presumption against a fictitious marriage, but there is the other presumption in favour of the innocence of the person charged: *King v. The Inhabitants of Brampton*, 10 East. 282. I also refer to *Taylor* on Evidence, 8th ed., p. 190, *ib.*, pp. 1216 and 1217; *Stephen's* Digest of Crim. Law Art. 257; *The Sussex Peerage Case*, 11 Cl. & F. 85; *Burt v. Burt*, 2 Sw. & Tr. 88, 29 L. J. P. & M. 133; *Russell* on Crimes, vol. iii., p. 268, note x; *Regina v. Povey*, 17 Jur. 120, 9 Cox C. C. 83, Dears. C.

C. 32, 22 L. J. M. C. 19; *Regina v. Smith*, 14 U. C. R. 565. The result of the authorities is, that there must be proof of what is necessary to constitute a valid marriage according to the law in the foreign state. Even assuming the *Griffin Case* to be good law, it does not conclude this case. *Regina v. Millis*, 10 Cl. & F. 534, shews this is not a canonical marriage; also *Catherwood v. Caston*, 13 M. & W. 261; and *Forsyth's Cases and Opinions on Constitutional Law*, p. 46. As to the clergyman not being a competent witness, *Regina v. Dent*, 1 C. & K. 97, is against my contention, and also *VanderDonckt v. Thelluson*, 8 C. B. 812. But *Regina v. Dent* was expressly overruled by the *Sussex Peerage Case*, and *VanderDonckt v. Thelluson*, was a question as to proving the law merchant of Holland: note (a) at p. 967. *Regina v. Charleton*, Jebb's C. C. (Ir.) 267, is an authority in my favour on this point, also the *Povey Case*, *supra*, and *Regina v. Savage*, 13 Cox C. C. 178, also the *Sussex Peerage Case*, 11 Cl. & F. 85; *Taylor on Evidence*, 8th ed., p. 1216. Mr. Campbell was not *peritus virtute officii*. See also, *Wharton on the Conflict of Laws*, 2nd ed., sec. 775; *Bristow v. Sequeville*, 5 Ex. 275; *Re Bonell*, L. R. 1 P. D. 69; *Cartwright v. Cartwright*, 26 W. R. 684. In a criminal trial if inadmissible evidence is left to the jury the conviction is bad, although other evidence supports the conviction. *Regina v. Gibson*, 18 Q. B. D. 537.

*J. R. Cartwright*, for the Provincial Government. As to the question of expert evidence the authorities are conflicting: *Arch. Pleading & Ev. in Crim. Cases*, 20th ed., p. 1010. The *Griffin Case* being the latest case, later than *Smith's Case*, 14 U. C. R. 565, or than *Savage's Case*, 13 Cox C. C. 178, and a considered case, and on a statute similar to this, should be followed in preference to the decision of a single Judge in the *Savage Case*. Supposing expert evidence is necessary, the evidence here goes beyond what it does in the other cases, the *Sussex Peerage Case*, for example. As to who may give evidence, I rely on *VanderDonckt v. Thelluson*, 8 C. B. 812; the language of Maule, J., there is

general enough to cover this case. I also cite *Ganer v. Lady Lanesborough*, 1 Peake's N. P. G. 25, referred to in all the cases, and explained by the *Sussex Peerage Case*, 11 Cl. & F., at p. 124. A recent case is *Re Dos della Khan*, 6 P. D. 6. The true position is, that any person, no matter what his position, who shews that he knows the law, and is a resident of the country, is a competent witness. I also refer to *Queen v. Jones*, 4 F. & F. 25; *Maxwell* on the Interpretation of Statutes, 2nd ed., p. 168; *Powell v. Appollo Candle Co.*, 10 App. Cas. 282; *Kiel v. Regina*, *ib.* 675; *Broom's Legal Maxims*, 6th ed., pp. 94, 95; *Story's Conflict of Laws*, 6th ed., sec. 625 (b).

*Meredith*, in reply. The Dominion has no jurisdiction over subjects outside of its jurisdiction; that is a matter over which Imperial Parliament has power by virtue of relation of sovereign and subject: *Wharton's Criminal Law*, sec. 271. *Dicey* points out the difference between a sovereign legislature, and one such as the Dominion Parliament. Extra-territorial jurisdiction exists only by virtue of sovereign power. As a resident of Canada, the law has nothing to do with a man of Canada, except by virtue of his allegiance to the Queen.

July 5th, 1887. BOYD, C.—Parliament, according to Blackstone, can do everything that is not naturally impossible; this being the place where that transcendent and absolute power which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms: (vol. i. p. 160.) Hence no British Court has ever exercised, or has been considered to possess, jurisdiction to declare that an Act of the British Parliament is unconstitutional or void. Such a power, however, does exist both in Colonial and English Courts, with regard to Colonial legislation. In this particular, according to Mr. Dicey, consists the essential difference between subordinate and sovereign legislative power: (Law of the Constitution, p. 95.) But for the present inquiry it is needful to consider precisely the scope of that right of interference with Colonial legislation, which



Courts possess. In Canada there are but two lines of judicial investigation open in order to determine whether the enactment shall or shall not be obeyed. The first and chief is, when the question arises whether the statute transcends the powers conferred or invades the limits prescribed by the British North America Act: (30 Vict. ch. 3). The second, and that of comparatively infrequent occurrence is, when it is needful to determine if the statute is repugnant to Imperial legislation. The latter is that with which we have now to deal. By section 91 of the B. N. A. Act, the Parliament of Canada is alone authorized "to make laws for the peace, order, and good government of Canada," and specifically in relation to "Naturalization and Aliens," "Marriage and Divorce," and "The Criminal Law." Therefore it has exclusive power to legislate as to bigamy. But is the Dominion enactment touching this offence, repugnant to the law of England? The test is not a sentimental or a theoretical one, involving an inquiry as to natural justice, and the spirit of the laws. It must be resolved by an appeal to the written or statutory law of the mother country, and the repugnancy must be such as is defined and explained by the Imperial Statute: 28-29 Vict. ch. 63.

By section 2: Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament *extending* to the Colony, to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or *having* in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be, and remain absolutely void and inoperative; and by section 3: "No Colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid." The determination of repugnancy really resolves itself into a question of interpretation and construction. If between the enactment of the colony and an

Imperial Act relating to the colonies in terms, or a general Imperial Act, which is of such universality and public importance as obviously to run paramount wherever the Queen's sovereignty obtains, there is such conflict that both cannot stand together, then it must follow that the Colonial Statute is inoperative and void. But in the present case no such conflict is pointed out; no Imperial legislation is indicated, which is inconsistent with the Colonial law in hand. The objection urged is, that the Dominion Parliament had no authority to pass an Act making the contracting of a second marriage in a foreign country a crime. But where is to be found any limitation of its authority in this direction? It was argued as if the law were in some sense extra-territorial; but that is not so, for it is only intended to affect the man on his return to the Dominion after having committed the offence. (See R. S. C. ch. 161, sec. 4.) Again, it was argued as if it were an interference with the right or duty of the foreign country to punish the offence committed in its precincts. But the statute is restricted to a British subject resident in this country; and an accurate American text writer commenting on the English Statute, which is *in pari materia*, says, "obviously the statute thus limited to British subjects, is proper and just, and conformable to the law of nations:" *Bishop on Statutory Crimes*, 2nd ed. s. 587. And further, it is contended that the power so to legislate rests on the doctrine of allegiance which has reference to the Crown and the central Government, and not to the colonies. I do not perceive the force of this. It is Her Majesty who takes part in Colonial legislation as much as in Imperial. The B. N. A. Act, section 17, shews that the Parliament of Canada consists of the Queen, the Senate, and the House of Commons, and the Royal assent is given to bills that they may become law by the Governor-General exercising the delegated prerogative of the Queen (section 55.) Canada is part of the Queen's Dominions; Canadians are Her liege subjects, and allegiance is due from those born here to Her Majesty, by the

very fact of birth within the ligeance : *Blackstone* Comm. Vol. I. p. 367. *Quoad* Canada, and as to British subjects resident here, the Parliament of Canada has the same authority as that possessed by the Imperial Parliament with reference to British subjects throughout the realm. With regard to the large range of subjects committed to its jurisdiction by the B. N. A. Act, Canada has powers of legislation co-ordinate with those of the Imperial Parliament. Such is the decision of the Privy Council in the most recent case of *Powell v. Apollo Candle Co.*, L. R. 10 App. Ca. 282, as well as in other Colonial appeals therein referred to. It was there declared that the Canadian Parliament when acting within the limits prescribed by the constitutional Act of B. N. A. has, and was intended to have plenary powers of legislation as ample and of the same nature as those of the Imperial Parliament itself. A Colonial Legislature, though restricted in the area of its powers, is within that area unrestricted and supreme. So in earlier cases in which the constitution of colonies was not nearly so close upon the verge of independence as that of the Dominion as now established, it was held that though the status of individuals resident in the colony must be determined by the laws of England, yet the rights and liabilities incidental to such status, must be determined by the laws of the colony : *In re Adam*, 1 Moo. P. C. 460, and *Donegani v. Donegani*, 3 Knapp. at p. 85.

Coming, however, to the particular statute now in question, it is not even of a character different from that of the English law—much less repugnant thereto. This branch of criminal law was kept uniform with that of Great Britain by adopting the enactments and the improvements of the mother country, so that the general spirit and policy of the law of England, in this regard, has been embodied and worked out in the law of Canada.

The argument *ab inconvenienti* that the person offending might be subject to criminal proceedings, both in England and in Canada, is not to be regarded. One who is prosecuted for bigamy in this country under this stat-

ute and punished, has satisfied the claims of British justice and will not be further harassed. This is in conformity with the principle recognized even in an extreme case by Cockburn, C. J., in *Phillips v. Eyre*, L. R. 4 Q. B. at p. 241-2, where he says: "Local Legislatures having been established in our colonies with plenary powers of legislation, the same comity which obtains between nations should be extended to them by the tribunals of this country, when their law conflicts with ours in respect of acts done within their jurisdiction." See, also, *Andrew v. White*, 18 U. C. R. 170.

The opinion of the law officers of the Crown as to the legality of Lord Durham's ordinances to be found in *Forsyth's Cases and opinions on Constitutional Law*, at p. 465-6, and relied on by Mr. Meredith, are clearly distinguishable from this question of *ultra vires*. That opinion is evidently based upon the general rule that the laws of a colony cannot extend beyond its territorial limits, as expressed more recently in *Low v. Routledge*, L. R. 1 Ch. at p. 47. The law officers considered part of the ordinance invalid, because it attempted to justify restraint of the person beyond the confines of the province and in another colony, in the case of political offenders deported without trial before any tribunal. Whether that conclusion may not be affected by the Case of *Leonard Watson*, 9 A. & E. 721, so as to justify a qualified or provisional restraint without the province, I need not pause to consider, because in the present statute there is no assumption of extra-territorial jurisdiction to be put into operation outside of Canada. In bigamy, the offence which at common law consists of the second marriage, must be committed within the limits of the country in order to give jurisdiction to the Courts of that country, because as put in *Sir John Kelyng's Reports of Crown Cases*, p. 20 (79): "Felonies done in another Kingdom, are not by the common law triable here in England." But the amendment of the law by this statute, makes it immaterial where the second marriage was had, in the case of a British subject resident in Canada, who being married,



leaves Canada with intent to contract, and who does contract a second marriage elsewhere : *Regina v. Pierce*, 13 O. R. 226. Such conduct "by reason of its being" (to use the words of *Blackstone*, Comm. Vol. iv. p. 163) "so great a violation of the public economy and decency of a well ordered state," merits condign punishment, but at common law there was a want of jurisdiction which the statute remedies by permitting the offender to be dealt with in the country where he is apprehended or is in custody. (C. S. C. ch. 99, sec. 9, p. 1010.)

It appears to me that all the objections urged against this statute are for legislative and not judicial consideration. It is for Parliament to consider what manner of legislation is best adapted to advance the well-being of the country, and to repress disorder and crime. This point is adverted to by Lindley, J., in *Regina v. Keyn*, 2 Ex. D., 94 ; and it is also very pointedly stated by Lord Halsbury, in giving the judgment of the Privy Council in *Regina v. Riel*, L. R. 10 App. Cas. 675. There he construed the statute 34-35 Vict. ch. 28, which authorizes the Parliament of Canada to provide for the administration peace, order, and good government of any territory, not for the time being included in any Province of Canada. These words, he held, vested in that Parliament the utmost discretion of enactment for the attainment of those objects.

Again, the limited functions of the judiciary to nullify Acts of Parliament has been considered by a Judge of great authority in *Regina v. Keyn*, 2 Ex. D. at p. 160, where Cockburn, C. J., is thus reported : "If the Legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of international law with the government of other nations." See also at pp. 207, 220.

Here, however, no such over-reaching legislation has been attempted : all that has been done is so to provide

that (to borrow the expression of Sir R. P. Collier in *Regina v. Mount*, L. R. 6 P. C. 294): "The effect of the statute is, to treat the offence as having been committed in the colony."

But the matter may be followed yet further in another direction.

The very history of legislation respecting bigamy in Canada, affords most cogent evidence against the objection before us. In England, by 9 Geo. IV. ch. 31, sec. 22, the law of bigamy was extended so as to include "second marriages," though entered into out of the jurisdiction of England when the offender was a British subject. This was the original of the first Canadian Act passed in 1841. (4-5 Vict. ch. 27, sec. 22). This was enacted under the powers conferred by the Imperial Statute, which reunited the Provinces of Upper and Lower Canada, and established the government of old Canada. (3-4 Vict. ch. 35.) Sec. 3 of that Act empowered the Legislative Council and Assembly of Canada to make laws for the peace, welfare, and good government of the Province, such laws not being repugnant to that Act or other Acts of Parliament extending to Canada, and it declared that such law being assented to by Her Majesty, or in Her Majesty's name by the Governor, should be valid and binding to all intents and purposes within the Province of Canada.

Some twelve years after its passing, the validity of the Act was contested in a Lower Canadian Court, in *Regina v. McQuiggan*, 2 L. C. R. 340, and though the judgment of the Court proceeded on another ground, yet the Judges distinctly ruled that it was constitutionally valid. Having passed into the Consolidated Statutes of Canada, as ch. 91, secs. 29 and 30, it was the law in force when the British North America Act was passed. By sec. 129 of that Act, all laws in force in Canada (of which the Judges as well as the Queen and Legislature had declared this to be one) were continued in force subject to the right of the Parliament of the Dominion to repeal, abolish, or alter the same. After Confederation the same

provisions were again re-enacted by the Dominion Parliament, in 32 & 33 Vict. ch. 20, sec. 58, and from thence were carried into the new revision of statutes of the Dominion, as ch. 161, sec. 4.

This statutory law, as to bigamy in Canada, is thus nearly half a century old; it has been affirmed by the Court, passed upon more than once by competent Colonial Legislatures, and ratified by the express sanction of the Imperial Parliament and Her Majesty in person. Surely nothing remains but for us to declare unhesitatingly that it is of binding and conclusive authority in every case to which it is applicable, upon all subjects of Her Majesty resident in Canada, and in all Courts of the Dominion.

I am against the other series of objections which resolve themselves into this, that no proper evidence was given of the second marriage which was solemnized in the State of Michigan. The written law of the foreign country need not be proved as settled in *Baron de Bode's Case*, 8 Q. B. 208, 246, and 250. It is said in *Cloyes v. Chapman*, 27 C. P. at p. 30, that the legal way to prove the law of the State, (in that case, New York,) is to call a skilled witness, and to examine him *vivâ voce*, yet the reports may be looked at by the Judge to satisfy himself. See also as to this, *Rice v. Gunn*, 4 O. R., at p. 589. The main and the disputed question is, who is a proper skilled witness, if the foreign law is to be proved? Cases conflict. In one case in 1876, Lush, J., ruled out the evidence of a Roman Catholic priest who had performed the marriage ceremony in Scotland, as not competent evidence: *Regina v. Savage*, 13 Cox C. C. 179. This, however, was the case of *first* marriage. But in *Regina v. Orgill*, 9 C. & P. 80, the second marriage which was by a Roman Catholic priest in Ireland, was held sufficiently proved by the evidence of the woman herself, if the jury believed her. In *Regina v. McQuiggan*, 2 L. C. R. 340, the second marriage, which was in the States, was proved as here by the evidence of the officiating minister. See note at p. 346. *Regina v. Povey*, 6 Cox C. C. 83, much relied on for the prisoner, does not really aid his contention—

rather is it in favour of the broad view of the law taken in the Common Bench. As I read *Regina v. Povey*, it holds that a professional expert in the foreign law is not necessarily required in order to prove that law as to marriage, but it may be by some one who understands the law and professes to know it. It was in these last respects that the evidence failed in *Regina v. Smith*, 14 U. C. R. 565, when, besides, the proof was as to the *first* marriage. The decision in the Common Bench is *VanderDonckt v. Thelluson*, 8 C B. 812, the effect of which is very concisely as well as accurately given by *Powell on Evidence*, 4th ed., p. 302, thus : "Foreign laws must be proved by skilled witnesses. The witness must be \* \* connected in such a way with the profession or have had such daily experience of the law in question, as to create a reasonable presumption that he has a competent knowledge of it. No witness will be competent unless he appear either to have filled an official position or to be connected manifestly with the legal profession, or to have been in some position in which it is probable that he would have acquired a practical acquaintance with the law." *Russell's* comment on the same case is given in his *Treatise on Crimes and Misdemeanours*, 5th ed., vol. iii. p. 422, note : "The competency of a witness to prove foreign law, is a question for the Court, and it seems, as a general rule, that in order to render a person competent, he should have some peculiar means from his profession or business, of becoming acquainted with the law, with respect to which he is called on to speak." In *Nelson v. Bridport*, 8 Beav. 526 at p. 538, Lord Langdale said : "It is held to be sufficient, if a person proved to be experienced and to have had the means of acquiring an accurate knowledge, thinks fit to state distinctly, that in his opinion the law and its application to the case in question, are such as he states them to be." At an earlier page he says, it may be proved "by witnesses, who can state from their own knowledge and experience, gained by study and practice." This is from a Judge conspicuous for his care, and one of the best judi-



cial authorities upon matters of practice : *Irving v. Boyd*, 15 Gr. at p. 160.

The second marriage here is proved by the girl herself, and the minister of the Methodist Episcopal Church who officiated. He has been twenty-seven years a minister of that body and for twenty-five years ordained, which by the rules of that church qualified him under the State law to perform the ceremonial of marriage. During these twenty-five years he has lived in Michigan, and been in the habit of marrying people. He professes to know the law, has the laws in his house, and has corresponded with the Secretary of State on that subject. The marriage was a public one before witnesses, and duly entered in the register kept by the minister in the course of his duty. I cannot bring myself to doubt the entire competency of this witness. Lord Eldon says, in *Candler v. Candler*, Jac., at p. 232, that a long course of practice sanctioned by professional men, is often the best expositor of the law. As expressed by Brett, J. A., in *Regina v. Aspinall*, L. R. 2 Q. B. D. at p. 61, "Judges are entitled and bound to take judicial notice of that which is the common knowledge of the great majority of mankind, and of the great majority of men of business." Every one knows that there is no established church in the United States, and that only officers empowered by the State can celebrate marriages and that all religious denominations are on an equal footing. When we find a minister of long standing in a reputable Christian denomination, for twenty-five years marrying people under the constitution of his church, and according to the laws of the State in which he has all that time lived, we have one who can be received as competent to speak of that law and its requirements. In the given circumstances, I am also of opinion that a sufficient foundation has been laid (if it were necessary to rely on that) for the presumption that the second marriage was duly celebrated : *Regina v. Cresswell*, 1 Q. B. D. 446. And I am also of opinion that in the case of a second marriage, it is not essential to prove the foreign

law in the case of British subjects as these were. The decision of the Court for Crown Cases Reserved in Ireland, *Regina v. Griffin*, 14 Cox C. C. 308 and more fully given in 4 L. R. Ir. 497, commends itself to my judgment as being an exposition of the law on sound principles, which may well be followed by this Court. The value and authority of such decisions in Irish Courts upon statutes common to them and us, is declared by Campbell, C. J., in *Doe d. Newman v. Rusham*, 17 Q. B. at p. 736. Although in criminal cases we are not bound to follow other decisions, yet I gladly adopt the reasoning of that case (*Regina v. Griffin*) which justifies with more cogency than I can do, the conclusion that the evidence in the present case reserved, was sufficient to warrant conviction.

Judgment will be for the Crown, affirming the conviction.

FERGUSON, J.—The conviction is under the 4th section of ch. 161 of the Revised Statutes of Canada. The objections made to it are two in number, (1) That the legislation is *ultra vires* and unauthorized; (2) That the second marriage or alleged second marriage of the prisoner was not properly proved, in this, that there was not proper evidence of the marriage laws of the State of Michigan, the State in which the alleged second marriage took place, and without such evidence the conviction could not properly have taken place.

As to the first of these objections: The section of the Act is as follows:

4th. "Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony, and liable to seven years imprisonment.

2nd. "Nothing in this section contained shall extend to,

(a.) "Any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty, resident in Canada, and leaving the same with intent to commit the offence.

(b) "Any person marrying a second time whose husband or wife has been continually absent from such person for the space of seven years then last past, and who was not known by such person to be living within that time.

(c) "Any person who at the time of such second marriage was divorced from the bond of the first marriage; or,

(d) "Any person whose former marriage has been declared void by the sentence of any Court of competent jurisdiction."

This enactment is substantially the same as section 22 of the Act 4 & 5 Vict. ch. 27, and ever since the year 1841, seems to have constituted part of the criminal law of this country. It is sections 29-30 of ch. 91, of the Consolidated Statutes of Canada, which came into force in 1859. It is also the 58th section of ch. 20 of the Act of 1869, 32-33 Vic., (D.) entitled "An Act respecting offences against the person; and it is now as before stated, section 4 of ch. 161, of the R. S. C.

There are some differences in the words in which the enactment is expressed in some of these statutes, but for the purposes of the contention here there is not so far as I can see any material difference. The 91st section of the British North America Act enacts that it shall be lawful for the Queen by and with the advice of the Senate and House of Commons to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces. This is not any of the matters so exclusively assigned. The section, however, goes on and says, "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated—that is to say." And then number 27 of this enumeration is, "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the

procedure in criminal matters." But for the contention now raised, one could scarcely doubt that the enactment in question is a law "made for the peace, order, and good government of Canada" in respect of a subject or matter, which in the distribution of legislative powers, is, by the said 91st section, given or assigned to the Parliament of Canada, and that the enactment is unobjectionable, even if it were assumed that the Court has power and jurisdiction to consider and determine as to the validity or not of an Act of the Parliament of Canada, in cases other than those that arise in regard to the powers of the Provincial Legislatures, and those of the Parliament of Canada under the 91st and 92nd sections of the B. N. A. Act, and cases in which it is alleged that the Act complained against conflicts with an Imperial Act.

The contention, however, as nearly as I understand it is, that the alleged offence, if committed, was committed in the State of Michigan where the alleged second marriage was solemnised and consummated; and that the Parliament of Canada has not and cannot have legislative power over such an offence, even though committed by a subject of the Crown who is a resident of Canada, although it was, and had to be conceded, that in such a case the Parliament of England has this legislative power and jurisdiction. The argument, as I understood it, was placed upon the footing, that the allegiance of the subject is to the Crown and not to Canada, even though he be a resident of Canada; and that owing to the relationship between the subject and the Crown, the power exists in the Parliament of England, but does not and cannot exist in the Parliament of Canada.

Counsel referred to *Forsyth's Cases and Opinions on Constitutional Law*, p. 465, where appears the joint opinion of the Solicitor General and Sir R. M. Rolfe on the illegality of an ordinance passed by the Governor and Council of Lower Canada, directing certain persons to be transported to Bermuda and detained there. The Legislature of Lower Canada, as constituted by 31 Geo. III. ch. 31, had conferred upon it a general sovereign legislative power within



the Province. The statute 1 Vic. ch. 9, sec. 2, authorized the Governor and special council to make such laws or ordinances for the peace, welfare, and good government of Lower Canada, as the Legislature of Lower Canada, as there constituted, was empowered to make, with certain exceptions which were not considered material in the case. In this joint opinion there is this passage: "We have to state that in our opinion so much of this ordinance as directs the class of persons therein first enumerated to be transported to Bermuda, and to be kept under restraint there, is beyond the power of the Governor and special council and void;" and in the concluding parts of the opinion this passage occurs: "With respect to that part of the ordinance which is to be executed beyond the limits of the Province of Lower Canada, we are of opinion that it would acquire no force by being confirmed by Her Majesty." Now, this seems to me to be wholly inapplicable to the argument in the present case, for it is not pretended that under the statute in question, any punishment could be inflicted upon the offender so long as he remained in the foreign country or until he returned to Canada.

Reference was also made to *Todd's Parliamentary Government* in the British Colonies, to show that the supreme authority with which colonial governments are clothed within the limits of the colony, to provide for the peace, order, and good government of the inhabitants, is subject to the constitutional oversight and discretion of the Crown. pp. 128 and 129. Reference was also made to pp. 2 and 4, *et seq.*, as to the effect of naturalization in the colonies and the Acts that have been passed on the subject; and to pp. 374 and 375, treating somewhat of the power of disallowance by the Canadian Parliament; but I do not find any thing on these pages that I consider of direct importance in considering the question raised.

A view of the matter that was urged by counsel on behalf of the Crown,—the Government of Ontario,—in addition to the contention that the Parliament of Canada had the undoubted right, power, and authority to pass the

enactment in question is this : at the time of the passing of the B. N. A. Act, the statute law now called into question had existence in the Consolidated Statutes of Canada, and by the 129th section of the Act, it was enacted that "except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick, at the Union, and all Courts of civil and criminal jurisdiction and all legal commissions, powers, and authorities, and all officers judicial, administrative, and ministerial existing therein at the Union should continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made, subject, nevertheless, (except with respect to such as are enacted by or exist under Acts of Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Provinces, according to the authority of the Parliament or of that Legislature under this Act"; and I cannot but think that the contention was and is of much force—that is to say, if it were conceded that Imperial legislation was necessary to the validity of the enactment in question, there was at that time such legislation continuing the Act that then existed, and there has since been no repealing, abolishing, or altering of it in any way material to the present contention beyond what was necessary for the condensing and consolidating of the statutes regarding crime, and when the Imperial Parliament used the words "All laws in force," it seems to me plain that what they meant was, all laws that in fact existed in the respective countries mentioned and then considered as valid and in force, which would clearly include the Act on this subject then in the statute book. A question of the same character as the one raised here, was raised in the Province of Quebec, in the case *Regina v. McQuiggan*, 2 L. C. R. 340, and the Court was of opinion against the contention and in favor of the power and jurisdiction. And much that appears in the cases of *Powell v. The Apollo Candle Co.*, 10 App. Cas. 282, and *Riel v.*

*Regina, ib.*, 675, indicate to me the same conclusion as being the correct one, and after having consulted, I think, every authority referred to by counsel, my conclusion is, that there is nothing against the validity of the Act that can be urged with success, even assuming it to be a matter open for consideration and determination by the Court here, which I apprehend is the case.

Then as regards the other question, that is, whether or not the alleged second marriage was properly proved, or rather as to whether or not the marriage law of the State of Michigan should have been proved by witnesses or a witness skilled in that law as a profession, &c, for the fact of the marriage was undoubtedly well proved; this was shown by the evidence of the woman and that of the clergyman who performed the ceremony. His evidence shows that he has been for twenty-seven years a clergyman of the Methodist Church, and all this time in the State of Michigan; that during the first two or three years he did not perform the ceremony of marriage not being then, according to the rules of the church, qualified so to do; but that during the past twenty-five years he performed or solemnized hundreds of marriage ceremonies; that he understands the laws of the State of Michigan relating to marriage; that he has had communication with the Secretary of State regarding these laws, and that this so-called second marriage was solemnized by him in the State of Michigan according to the marriage laws of that State.

Upon the subject as to whether or not this clergyman was, at the trial, a competent witness to give this testimony regarding the laws of the State, very many cases and authorities were cited by counsel for the prisoner, at all of which I have looked with, I may say, some care, but I intend to refer to only a few of them here. It cannot be said that the cases on the subject are uniform, or at least I have been unable to think them so. There appears, however, to be a distinction generally, though not universally made, between the first marriage and the second marriage in regard to the evidence necessary for the proof;

and this apart from the fact that when there has been a valid first marriage, the second marriage during the life of the wife or husband, as the case may be, cannot be valid.

In the present case, there was no question whatever as to the validity of the first marriage. In the case of *Regina v. Allen*, 1 C. C. R. 367, the head note, so far as it has any application here, is: "Where a person already bound by an existing marriage, goes through with another person a form of marriage known to and recognized by the law as capable of producing a valid marriage for the purpose of a pretended and fictitious marriage, such person is guilty of bigamy, notwithstanding any special circumstance which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their case;" and these are the concluding words of Chief Justice Cockburn in delivering a judgment, in which many of the cases are referred to, and some of them commented upon.

In the case of *Regina v. Griffin*, 14 Cox, C. C. 308, it was held, though the Court was not unanimous, that in a case of bigamy, a marriage contracted according to the rites of the Roman Catholic Church in a foreign State, is presumed to be good without proof of the law of that foreign State relating to marriage. The defendant had been married in Ireland in 1871. No question was raised as to the validity of the marriage. Shortly after this marriage he moved or went to America, where in the State of Illinois he married again. Both ceremonies were performed or solemnized by clergymen of the Roman Catholic Church. Both the contracting parties (those to the second marriage) were subjects of Her Majesty. There was nothing to show that they or that either of them had obtained an American domicile, and both returned to their native land, Ireland, where the case was tried. Lawson, J., in his judgment says, at p. 311: "In my opinion, supposing it to have been necessary to show that his marriage was a valid one according to the law of Illinois, it must be presumed to be



so in the absence of evidence to the contrary. The ceremony was publicly performed by the clergymen of the church, of which the contracting parties were members.

\* \* We are not to be supposed to be ignorant of the fact that the Catholic religion prevails over the world; that its priests and places of worship are recognized. And if we find that a ceremony was publicly performed according to the rites of that church, are we to require the presence of an expert to depose that such a marriage is a legal one in the State of Illinois? We should presume in the absence of evidence to the contrary, that the clergy were acting according to law; and that they solemnized a valid marriage." The learned Judge then refers to authorities in support of the view of the law stated in his judgment, and amongst others to *Regina v. Allen*, 1 C. C. R. 368, saying, "this case appears to have restored the law to what it was understood to be before the case of *Regina v. Fanning*, 17 Ir. C. L. 289, 10 Cox C. C. 111, and to have set up the authority of the case of *Regina v. Brawn*, 1 C. & K. 144, where Lord Denman thus lays it down: 'It is the appearing to contract a second marriage and the going through the ceremony, which constitute the crime of bigamy.'"

In the case of *Regina v. Smith*, 14 U. C. R. 565, the contention was as to the proof of the first marriage, which had taken place in the State of New York before a Justice of the Peace; and the witness who said the justice had authority to solemnise marriages, did not appear to have knowledge or to have occupied any position in which he would have acquired knowledge on the subject. In the case of *Regina v. Savage*, 13 Cox C. C. 178, a *Nisi Prius* case, it was held that in an indictment for bigamy, every thing relating to the first marriage must be proved strictly, and that evidence of a marriage in Scotland by a Roman Catholic priest who had previously performed similar ceremonies there, will not suffice without the proof of what the law as to such marriage is, although the prisoner may have admitted that he was in fact married in Scotland. In

that case the priest was called, and he said that the ceremony was performed according to the law of Scotland. That, however, was the case of proof of a first marriage, and unless there was a valid first marriage no crime could be committed by the second marriage; and the case is, as I have said, a *Nisi Prius* case.

In the report of the case of *Regina v. Griffin*, in 4 L. R., Ir. 497, Barry, J., says, at p. 416, with respect to the *Crown v. Savage*, he had consulted with Mr. Justice Lush, who informed him that he never intended to overrule *Regina v. Newton*, 2 Mood. & Rob. 503, and that all he intended to decide was, that under the circumstances of that case, he did not think the evidence of the first marriage sufficient.

In the case of *Regina v. Povey*, the question was as to the validity of the second marriage. It was before the full Court. It is reported in 6 Cox C. C. 83, and other places. It was held that some witness conversant with the Scotch law should be called. The witness who was called did not appear to know anything at all of the law. She said she was present at the marriage, and that she herself had been married the same way. She also said that persons were married in Scotland in private houses.

Jervis, C. J., in delivering the judgment of the Court, said, at p. 85: "The question for us is, whether there was sufficient evidence to go to the jury, and to justify them in finding the verdict they have done; or whether some witness conversant with the law of Scotland should not have been called to say whether the facts proved constituted a valid marriage according to the law of that country. This does not raise the question as to whether or not such witness should necessarily be an expert. It may not be necessary in all cases to have a professional person to tell us what a foreign law is, but we are clear that some one ought to have been called who understood the law with respect to Scotch marriages. The witness does not profess to know the law, nor does she in fact say that the ceremony was a ceremony of marriage."

In the case of *Burt v. Burt*, 2 S. & T. 88, the case was for bigamy and adultery, asking a dissolution of the marriage. The bigamy charged, was charged as having taken place in Australia, and it was held that to establish the bigamy it was necessary to give formal proof of the marriage law of that country which was not done, but the decree was pronounced on the other ground. The witness was the woman who said she had been married to a man of the name of Burt at Melbourne, according to the form of the Kirk of Scotland; that she had lived nine years there, and had known many persons married there in the same form who had lived together as man and wife. In respect to these two cases of *Regina v. Povey* and *Burt v. Burt*, Mr. Justice Palles, in concurring in the judgment of Mr. Justice Fitzgerald, in *Regina v. Griffin*, says, that he does not consider them in point, for in each case the minister in whose presence it was sought to validate the ceremony, was not a clerk in Holy Orders: 4 L. R. Ir. at p. 514.

The present case is much stronger—as to this point—against the prisoner than was the case of *Regina v. Griffin*, for there the only evidence of the second marriage was that of the woman, who proved that she had been married to the prisoner in the State of Illinois by a Roman Catholic priest, according to the rites of his church, and this was held sufficient proof of the second marriage without proof of the law of that State relating to marriage. Here, we are not left to say that we are not supposed to be ignorant of the fact that <sup>the</sup> Methodist Church has an existence in the State of Michigan, for the witness, the clergyman, tells us this, and states the long period during which he has been a minister of it in that country. It is established by the *Sussex Peerage Case*, 11 Cl. & Fin. 84, and *Regina v. Povey, supra*, that the witness to prove the foreign law (even considering that to be necessary in the case of the second marriage after the decision in *Regina v. Griffin, supra*) need not necessarily be a foreign lawyer or professional man. The rule stated in

*Powell* on Evidence, 6th ed. at p. 324, is, that no witness will be competent, for this purpose, unless he appears to have filled an official position, or to be connected manifestly with the legal profession, or to have been in some position in which it is probable that he would have acquired a practical acquaintance with the law in question. For the last part of this rule the author, however, refers to the case of *VanderDonckt v. Thelluson*, 8 C. B. 812, which is a case as to the proof of the law merchant, which has sometimes been called a custom only, though in many instances, a matter of very grave importance.

In the present case, the evidence of the clergyman Campbell is in itself very strong evidence. He has had experience in solemnizing marriages for a full quarter of a century in the State of Michigan: he says he does know the law of that State upon this subject, and although he did not hold a position such as was held by the Bishop in the *Sussex Peerage Case*, 11 Cl. & F. 85, I am, after looking at all the authorities that were referred to by counsel, of the opinion that he was a good witness to show that the marriage ceremony of the second marriage of the prisoner was solemnized according to the law on the subject of the State of Michigan, although I am aware that there are some cases making against this conclusion. According to the case of *Regina v. Griffin*, *supra*, the evidence is abundant, and I do not think that in any view of the case in this respect, it falls under the law as stated in the case of *Regina v. Gibson*, L. R. 18 Q. B. D. 537, as adroitly put by counsel for the prisoner—namely, if any evidence not legally admissible against the prisoner, is left to the jury and they find him guilty, the conviction is bad, and this, notwithstanding there was other evidence before them properly admitted and sufficient to warrant a conviction. I am, for the reasons I have endeavoured to state, of the opinion that the conviction should be affirmed.

ROBERTSON, J., concurred.

A. H. F. L.



## [CHANCERY DIVISION.]

## AMBROSE V. FRASER ET AL.

*Husband and wife—Covenant running with land—Assignment of the reversion by the lessor to his wife—Separate estate—Privity of estate—Set-off.*

In 1849 W. F. married A. F. without marriage settlement. In 1872 W. F. entered into a covenant for himself, his heirs, and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malt-house, which the lessee was to have liberty to erect, and did erect upon the demised premises. Pending the term, W. F. conveyed the reversion in such a way that it became vested in himself and W. as trustee, as to the whole beneficial interest, for A. F.

*Held*, [affirming the decision of FERGUSON, J., reported 12 O. R. 459,] that the separate estate of A. F. was not bound by the covenant, though she was equitable owner of the reversion as above mentioned at the time of the erection of the malt-house, and until the expiration of the lease.

*Per* BOYD, C.—Whether the covenant was one that ran with the land or not, and whether A. F. or her trustees were assignees within the meaning of 32 Hen. VIII. ch. 34 or not, privity of estate is not tantamount to privity of contract so as without more to affect the separate estate of a married woman, as if she had expressly contracted with reference thereto.

*Held*, also, [affirming the decision of FERGUSON, J.,] that a claim on behalf of the said trustees for rent in arrear, and for damages for non-repair, was not matter of set-off against damages recovered against W. F. for breach of his said covenant, though he was one of the trustees, they not being matters arising in the same right.

*Per* BOYD, C.—*Seem*le, if the amount to be paid for the malt-house had formed a lien on this particular land out of which the rent issued, it may be that the claim for set-off in respect of rent in arrear and damages for non-repair would have prevailed.

THIS was an appeal by the plaintiff, by way of motion to the Divisional Court, from the judgment of Ferguson, J., reported 12 O.R. 459, where the facts fully appear.

The motion came on for argument on February 25th, 1887.

Moss, Q. C., for the plaintiff. We are moving against the judgment of Ferguson, J., both on the facts and the law. Mrs. Fraser was the owner of the property from the beginning and is bound by her husband's covenant as her agent, and she is also bound as the assignee of the reversion. There is no doubt the covenant runs with the land, and Ferguson, J., so found. At any rate she had notice of

this covenant, and the moment she became assignee of the reversion, she was bound to pay (having notice she took it with the burden). The breach of the covenant accrued during the holding of Mrs. Fraser. I refer to *Spencer's Case*, Smith's L. C., 8th ed., p. 68. All the cases are collected in *Emmett v. Quinn*, 7 A. R. 306. See also, *Berrie v. Woods*, 12 O. R. 693; *Minshull v. Oakes*, 2 H. & N. 793; *Cooke v. Chilcott*, 3 Ch. D. 694; *Woodfall* on Landlord and Tenant 13th ed., p. 164. If Mrs. Fraser had made this covenant her separate estate would be liable, and these cases shew that the assignee is liable. See also, *Tulk v. Moxhay*, 2 Phil. 774; *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; *Kerr v. Stripp*, 24 Gr. 198. The covenant here is an affirmatory one. Mrs. Fraser got the benefit of the lease and of the erection, and there is no reason why she should not pay for it.

Osler, Q. C., for the defendants. This is a personal covenant, not a covenant running with the land. It is a peculiar covenant being with only one lessee. The converse of the case is *Wakefield v. Brown*, 9 Q. B. 209, where the covenant to repair was made by the lessee with the lessor and another. Doubt is thrown on it in *Magnay v. Edwards*, 13 C. B. 479. It is not a right given to the lessees by virtue of the term. Such a license might have been in favour of a person not a lessee at all. See *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750, which overrules *Cooke v. Chilcote*, 3 Ch. D. 604, and decides that *Tulk v. Moxhay* is limited to restrictive stipulations. Even if Mrs. Fraser had notice through her husband, this is not a restrictive covenant, and she is not bound to fulfil it. *Mansel v. Norton*, 22 Ch. D. 760 is the nearest case to the plaintiff's proposition. If this is a covenant running with the land the responsibility rests on the person holding the legal estate. I refer to *Lewin on Trusts*, 8th ed., p. 234; *Burgess v. Wheate*, 1 Eden at p. 251; *Wright v. Chard*, 4 Drew 673; *In re International Contract Co., Pickering's Claim*, L. R. 6 Ch. 525; *MacLennan's Judicature Act* 2nd ed., p. 234; *White v. Hunt*, L. R. 6 Ex. 32; *Gorton v. Gregory*, 3 B. & S. 90. There was

privity of estate by estoppel which only continues during the term: *Gregory v. Doidge*, 3 Bing. 474; *Brook v. Biggs*, 2 Bing. N. C. 572; *Hillock v. Eliza Sutton*, 2 O. R. 548. This is a case of a married woman, and the cause of action arose before the Married Woman's Property Act of 1884, but after the Act of 1872. She was married without settlement in 1849. There is no covenant by the married woman. They must shew actively and incisively a promise. She is not bound by any covenant her husband enters into as trustee. He could not have entered into the covenant with reference to her separate estate: *Johnson v. Gallagher*, 3 DeG. F. & J. 494; *Cahill v. Cahill*, 8 App. Cas. 420; *Stanley v. Stanley*, 7 Ch. D. 589.

*Moss*, in reply. This covenant is of a very usual kind between both the lessees and the lessor, although it is for only one of the lessees to do the act in question: *Harley v. King*, 2 C. M. & R. 18; *Woodfall* on Landlord and Tenant, 13th ed., p. 262. The liability here arises from the act of the parties, and the act of law, and is not a matter of contract as to us. We cannot help the assignment being made.

September 5th, 1887. *Boyd, C.*—It is not needful to consider whether in the circumstances of this case (the legal estate being outstanding in the mortgagee at the time the lease was made, and the premises being afterwards sold under that mortgage pending or before this action,) the defendant, the married woman, or her trustees, were assignees within the meaning of 32 Henry VIII. ch. 34: upon which question reference may be made to the *Mayor, etc., of Carlisle v. Blamire*, 8 East, at p. 497, and *Cuthbertson v. Irving*, 4 H. & N. at p. 754. Whether the covenant to pay for the malt house did or did not run with the land in this case, the married woman is not bound by it as a matter of contract, and there is no evidence that she intended to bind her separate estate in reference to this transaction. The question for determination may be dealt with as under the old law relating to separate estate, because we have no

contract either written or by parol on the part of the married woman to which the statute in force at the date of this transaction is applicable. If the married woman is liable, or her estate, rather, it is by virtue of the statute of Henry VIII., and the frame of the lease by which the lessor covenants for himself and his assigns. The liability thus arising is not from privity of contract but from privity of estate which is by that statute made an equivalent. That, however, cannot be regarded as a doctrine to be extended to the case of married women to whom the reversion is conveyed: *Barnfather v. Jordan*, 2 Dougl. 451.

The liability arising by implication of law in the absence of contract is no more operative now than it was before Married Woman's Acts prior to 1884. In *Jones v. Harris*, 9 Ves. 486, an annuity granted by a *feme covert* charged upon her separate estate being void for informality under the statute, Eldon, L. C., refused to charge the consideration on the separate estate or the rents thereout, though part of this money was applied in paying fines of admission to part of the estate which was copyhold. This was carried further by Leach, V. C., in *Aguilar v. Aguilar*, 5 Mad. 414, where the *feme covert* was allowed to file her bill to avoid such an annuity in which she had joined without offering to repay the consideration, and it was declared that there was no lien therefor upon her separate property. In *Wright v. Chard*, 4 Drew. 673, a *feme covert* had received the rents of an estate claiming them as her separate property but it turned out that she was not entitled to them. It was sought to charge her separate estate on the ground that she had received what did not belong to her and that there was an implied obligation to make her separate estate liable. But this was refused by Kindersley, V. C., who said that the plaintiff who seeks to charge the separate estate of a married woman must make out at least some contract or engagement with him on her part. This case was carried to appeal on one point and affirmed by the Lords Justices, 1 DeG. F. & J. 567. See the comments of Turner, L. J., on *Jones v. Harris*, and



*Aguilar v. Aguilar*, in *Johnson v. Gallagher*, 3 DeG. F. & J. 514, 515.

There is an entire absence of allegation or evidence here to show that the married woman has in any way implicated her separate property upon the covenant of the lessor, her husband. *Sawyer v. Sawyer*, 28 Ch. D. 575, is important on the general question of her liability apart from contract. Chitty, J., said: "When there is a written contract, the fact of there being a writing has been held to be a sufficient indication on her part that the demand shall be answered from the separate estate. Where there is no writing the case depends upon the circumstances, and it must be shewn that the engagement of the married woman, which *primâ facie* is void, because she is under coverture, and has no power to contract, was to be satisfied out of the separate estate." His judgment was affirmed on appeal, it being held that the separate estate was not to be charged on the mere ground of her having acquiesced in or approved of a breach of trust: to do this it must be shewn that she acted for herself in the breach complained of, and was fully informed of the state of the case. In *Wainford v. Heyl*, L. R. 20 Eq. at p. 324, Jessel, M. R., goes over the grounds of the liability of the married woman's estate upon contracts, and apart from contract states that her separate estate may be liable for a fraud relating to the separate estate, that is, dealing with the separate estate by way of fraudulent representation.

I think the proper conclusion is, that privity of estate is not tantamount to privity of contract in order, without more, to affect the separate estate of a married woman as if she had expressly contracted with reference thereto. There is no right therefore to fix liability for the amount claimed herein upon the separate estate of the defendant Augusta Fraser.

If the amount to be paid for the malt house had formed a lien on this particular land out of which the rent issues, it may be that the claim for set-off in respect of the \$275 awarded to the trustees under the counter-claim would have

prevailed. That, however, is not alleged nor was it so argued before us. The remedy for the value of the malt house appears to be a personal one based on the covenants and ascertained by the award, in respect of which, though there was a recovery against the trustees, they would have no right to be indemnified by the married woman, the *cestui que trust*. But the rent and repairs payable to them are so in trust for their co-defendant, so that the claim and counter-claim being in different rights, there can be no set-off.

The result is, that the judgment is in all points right, and is to be affirmed, with costs.

PROUDFOOT, J., concurred.

A. H. F. L.

---

## [CHANCERY DIVISION.]

## RE HALL.

*Parent and child—Advancement—Hotchpot—Promissory note—R. S. O. ch. 105, secs. 41-43—Administration—Parties—Next of kin.*

J. H. died intestate, and among his assets was a promissory note for \$500 made by his son in respect to moneys received by the latter from him. This son pre-deceased J. H. and died intestate and insolvent, leaving a child, who, under the Statute of Distributions, was entitled to a one-fifth distributive share of the estate of J. H.

*Held*, that the grandchild of J. H. was not bound to bring the \$500 into hotchpot before sharing in the estate of J. H., and that R. S. O. ch. 105, secs. 41-43, did not apply to this case.

Difference between the law of England and our own as to advancements to children, commented on. Under our law an advancement is neither a loan nor debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution.

*Seemle*, that the administrator of J. H. did not properly and fully represent the next of kin entitled to share in the estate of J. H., and they would not be bound by any decision in their absence.

THIS was a motion made by the administrator of Joseph Hall for an administration order.

The intestate left him surviving a widow and five children and one grandson, the son of a son of the intestate, who had predeceased the latter. There was only one question involved which was argued upon this motion, and it arose from the following circumstances. Among the assets of the intestate was a promissory note for \$500, made by his said son in respect of money received by him from the intestate. In the winding-up of the estate, it was contended that the grandson could not take a full share in the intestate's property without bringing the amount of this note into hotch-pot. The infant contended that he was entitled to a full share without reference to this debt of his father.

*J. R. Roaf*, for the administrator. It is laid down in *Williams on Executors*, 8th ed., pp. 1503, 1505, that where a man dies leaving children and grandchildren, the children of deceased children, these grandchildren take their share in their grandfather's estate by representation, and not in their own right; and in the case of *Proud v.*

*Turner*, 2 P. Wms. 560, it was held in a case identically the same as to representation as this case, but where the intestate had advanced moneys to the deceased son, that the grandsons had to bring this advancement into hotchpot before they could take a share of the intestate's estate, on the ground that they took their share by representation and not in their own right, and on this principle the infant in this case should be compelled to bring \$500 into the estate before participating.

*Hoskin*, Q. C., for the infant. Our statutes are different to the English statutes, in that, before an advancement can be charged it must be in writing and signed: *Filman v. Filman*, 15 Gr. 643; 14 Vic. ch. 6, sec. 20; and an infant is not responsible for the debts of his father unless he receives assets from the estate, and in this case it is a debt of the father which is to be brought in, and the infant has not received any assets from his father's estate, and so is not liable to have the amount in question deducted from his share.

September 13th, 1887. BOYD, C.—The grandfather, Joseph Hall, who died intestate, has left among his assets a promissory note for \$500, made by his son in respect of money received by him from his father, Joseph Hall. This son predeceased Joseph Hall, and died intestate and insolvent. He left a child, now an infant, who takes under the Statute of Distributions one-fifth distributive share of Joseph Hall's estate. The question is, should this \$500 be brought into hotchpot so as to equalize the shares going to Joseph Hall's four surviving sons and this grandchild? The difference between the law of England and that of Ontario as to advancement is pointed out by Spragge, V. C., in *Filman v. Filman*, 15 Gr. 648. The English cases I have consulted exhibit a very peculiar and anomalous state of the law. It seems to be held that for the purposes of distribution, loan, gift, and advancement may be treated as almost interchangeable terms. That which is originally a debt may, by the act of the father, be converted afterwards into an



advancement, and that which is a gift may afterwards be taken into account as part of the son's share of the father's estate: *Gilbert v. Wetherell*, 2 S. & Stu. 254, is one of the earliest, and *Re Blockley*, 29 Ch. D. 250, one of the latest decisions. But our statute R. S. O. ch. 105, secs. 41-43, requires that some certainty of definition be given to the term "advancement," by the very fact that it is to be evidenced by writing. This writing may be either an expression by the intestate that the donation is by way of advancement (which I take it is to be made contemporaneously with the transaction) or an acknowledgment to the same effect by the child. The intentions of the parent at the time of the donation is the all-important point, and the character of the dealing at that time must remain fixed unless it be changed with the concurrence of both parties.

Under our law an advancement is neither a loan or debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution. Here the only writing between the father and son is the promissory note given by the son which is held by the father's estate. This writing imports that the original dealing was one of loan or debt between the parties, and as such does not satisfy the statute. It appears to me impossible to give a double effect to the security so as to make it on the one hand represent a legal claim upon which an action may be brought to recover the amount advanced, and also to regard it as an acknowledgment in writing by the son that the \$500 was an advancement to be accounted for under the statute.

As I view the matter then, the statute does not apply to this case, and the infant is not required to bring the sum in question into hotchpot.

As a legal claim it is recoverable against the estate of the deceased son of Joseph Hall. But I do not at present see that it can form a matter of set-off or retainer in the hands of the administrator of the estate now in hand as

against the grandchild. It is not a debt for which the infant is liable directly, nor does that infant derive any assets from the estate of his father (the only debtor), for that is insolvent.

This last aspect of the case has not, however, been argued, and it is rather a matter for the other beneficiaries to take up than for the administrator to litigate. The equality contemplated by the statute is for the direct benefit of the other children, and for them alone. This being so, I rather think that they would not be bound by any decision made in their absence, because they are not properly and fully represented by the administrator. The better course will be for the administrator to pay the whole fifth share into Court, and then the other next of kin can take action relative thereto as they may be advised before it is paid out or applied for the benefit of the infant.

The costs of the present application should be out of the estate (a).

A. H. F. L.

(a) The beneficiaries afterwards appeared by counsel, and accepted the decision as binding upon them.—REP.

---

## [CHANCERY DIVISION.]

## CAMERON V. CAMERON.

*Misrepresentation—Bona fides—Actual fraud—Conveyance executed—Possession—Cancellation.*

H. D. C. agreed in writing with C. C. on January 17th, 1882, to sell to him lots 37 and 39 for \$5,450, payable \$1,791 on the delivery of the deed, and upon the title to lot 37 being found satisfactory to C. C. or his solicitor, and upon a quit claim deed of lot 39 being delivered; the balance to be secured by mortgage; said sale to be completed within thirty days, otherwise the deposit of \$25 to be forfeited. H. D. C., *bonâ fide* believing such to be the case, represented to C. C. at the time of the sale that a patent from the Crown had issued for lot 37, and relying on this representation C. C. entered into the agreement and afterwards verbally agreed to sell lot 37 at a large advance to one R. On February 10th, 1882, the conveyance was executed, the bulk of the purchase money \$4,025 having been paid prior thereto in cash, a promissory note being taken for the balance in lieu of a mortgage. It afterwards appeared that no patent had ever issued to lot 37, and notwithstanding the efforts of H. D. C., it was not till April 25th, 1883, that the department at length issued a patent, and then only for four chains of the lot, leaving ninety links outstanding. In February, 1883, C. C. had told H. D. C. that he would not keep the property, that by reason of no patent having issued, R. had withdrawn from his offer, and he demanded his money back with his actual expenses incurred. H. D. C. refused to cancel the sale, and C. C. now took these proceedings to have the sale rescinded, and the deed delivered up to be cancelled. *Held*, that there having been no actual fraud, and the deed of conveyance having been executed, the plaintiff could not have the relief sought for. *Wilde v. Gibson*, 1 H. L. Cas. 605, *Brownlie v. Campbell*, 5 App. Cas. 925, and *Hart v. Swaine*, 7 Ch. D. 42, distinguished.

THIS was an action brought by Charles Cameron, John J. Long, and Peter Campbell, against Hugh D. Cameron and Anna Maria Hyman, executor and executrix of the will of Ellis W. Hyman, deceased, to have a certain contract for the sale of land rescinded, and certain other relief under the circumstances set out in the judgment of Robertson, J. The writ of summons was issued on March 22nd, 1886, and the action was tried on March 22nd, 1887, before Mr. Justice Armour, at Toronto, who gave judgment dismissing the action, with costs, as set out *infra*.

The plaintiffs moved by way of appeal to the Divisional Court, and the matter came up for argument on June 15th, 1887, before Ferguson and Robertson, JJ.

*McCarthy*, Q. C., for the plaintiffs. There was a distinct representation at the time of the agreement that a patent to lot 37 had issued, and the trial Judge so finds. This was not false or fraudulent in the sense in which it would be necessary to establish it in an action for deceit. It was a representation of importance on which we acted. On the discovery of this, notwithstanding the deed, my client was entitled to rescind on the ground that it was legal fraud: *Hart v. Swaine*, 7 Ch. D. 42; *Redgrave v. Hurd*, 20 Ch. D. 1; *Petrie v. Guelph Lumber Co.*, 2 O. R. 218, 11 A. R. 336, 11 S. C. R. 450; *Burrowes v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 D. F. & J. 518; *Rawlins v. Wickham*, 3 D. & G. 304, 313; *Smith v. Chadwick*, 20 Ch. D. 27; 9 App. Cas. 187. These cases establish that a misrepresentation of a material matter entitles the party imposed upon to a rescission of the contract. Armour, J., refers to *Clough v. London and North Western R. W. Co.*, L. R. 7 Ex. 26, at p. 34, as laying down the law as to the remedy in a case of this kind, and that contains the proper rule as laid down afterwards in our own Court of Appeal in *Lee v. MacMahon*, 11 A. R. 555. See also *Morrison v. Universal Marine Insurance Co.*, L. R. 8 Ex. 40, 197. The question is, whether the party imposed upon has affirmed or disaffirmed the contract. There was extraordinary delay on the part of the vendor after the discovery that there was no patent. We are dealing here with speculative property and time was of great consequence. The question of the importance of time is dealt with in *Crossfield v. Gould*, 9 A. R. 218. The summer was wasted, and the 4th of November arrived when Ross declined to purchase. In the meantime the vendors had been pressing for payment of the note, and the vendee had been declining to pay. In November we elected to disaffirm the contract, and then we had an interview in the winter of 1882-83, when we demanded our money back, and offered the land back. Even if the four chains of the land had been patented we had the right to rescind because at this time we were only getting four chains, which could not be forced upon us.



*Moss*, Q.C., and *Witherspoon*, for the defendants. There were to be two separate conveyances of the properties, a quit claim of one and a deed of the other. The trial Judge does not find that H. D. Cameron misrepresented that the patent had issued. What he does find is, that all were under a mistake as to this—a very different thing. No such representation was made, nor is there any evidence that the defendants made a single statement or representation to induce the plaintiff to enter into the contract. That is the first step for the plaintiff Cameron to take, otherwise he is bound by his agreement or contract. After the deed was executed, delivered, and registered, the position of the parties was entirely fixed. The Hyman estate and not Mr. H. D. Cameron are to get the benefit of that. Anything that H. D. Cameron did after that could not avail as against the estate. H. D. Cameron did not do what he did as a duty—he did it as a friend to Charles Cameron “out of clanship,” as Mr. Justice Armour said. He was only one of two, and on his own account he could not alter the position of the parties. His position as a member of the plaintiffs’ syndicate shews his interest and supplies the motive, if anything more than friendship is needed. There is no evidence to shew that the matter was kept open; on the contrary, everything shews that it was closed, and what was done after it was closed was in aid of the plaintiffs’ title, not the defendants. It is an extraordinary thing to endeavour to create by these letters an antecedent duty in the face of the written contract, followed by the solemn deed. I cite *Wilde v. Gibson*, 1 H. L. C. 605; *Joliffe v. Baker*, 11 Q. B. D. 255; *Thomas v. Crooks*, 11 U. C. R. 579. This is not a case of something that cannot be covered by covenant, as to which I cite *Palmer v. Johnson*, 13 Q. B. D. 351. This case is different from *Hart v. Swaine*, 7 Ch. D. 42, where the property was wrongly described, even in the abstract delivered, as freehold when it was copyhold. It was on that representation that the party entered into the contract. I also refer to *Attwood v. Small*, 6 Cl. & F. 232, and cases cited

in the article on Constructive or Imputed Notice in 7 C. L. T. 129, as to knowledge of solicitor being knowledge of client. I submit that the position of Armour, J., that the plaintiff Cameron must be taken to have affirmed the transaction, should be sustained. In the spring of 1883 the parties were at arm's length, and the action was not brought till 1886. At any rate he should have come with a re-conveyance and asked his money back.

*McCarthy*, in reply. We differ from the defendants in their construction of the judgment of Armour, J. He found the misrepresentation, but he decided against the plaintiffs on the ground of laches in electing. If there had been no misrepresentation how could there have been an election? *Crossfield v. Gould*, 9 A. R. 218. The agency of H. D. Cameron continued in regard to everything about the contract. It is not like an auctioneer or any mere agent of that kind. He was a principal manager, and bound both parties. We have no evidence of what the trust was at all.

July 5th, 1887. ROBERTSON, J.—The action is brought for the rescission of a contract for the sale and purchase, as well as the conveyance executed in pursuance thereof, of two lots of land, being 37 and 39 in the parish of St. Clements, in the Province of Manitoba, and for an order requiring the defendants to refund the money paid by the plaintiffs, viz., \$4,050 on account of the same, together with interest from the time of payment to the defendants, the plaintiffs offering to make re-conveyance of the lots; and also for the re-delivery to the plaintiffs of a promissory note for \$1825, dated January 17th, 1882, made by the plaintiffs for the balance of the purchase money, to be cancelled for the payment by the defendants of the sum of \$500 expended by the plaintiffs in investigating the title to the said lands and in the preparation of plans thereof, &c.

The defendants, *inter alia*, set up by way of defence (4) that the agreement for the sale of the said lands provided

that the plaintiffs should satisfy themselves as to the title of lot 37 (this particular lot being the one chiefly concerned in this litigation), and that no representation as to the title to this lot was made to the plaintiffs by the defendants other than is contained in the said agreement, and the plaintiffs engaged a solicitor to examine the title to said lot 37, and in pursuance of and relying upon the said solicitor's opinion and upon their own investigation of the title thereto, paid over the purchase money, and thereupon a conveyance of the said lots, duly executed by the defendants, was delivered to and received by the plaintiff Cameron, who caused the same to be registered, and has ever since retained; and the plaintiffs accepted the title to and conveyance of the same and afterwards dealt therewith; (5) that the title to the said lot 37 was vested in the defendants at the time of making the agreement by Statute of Canada, 33 Vic. ch. 3, and amendments thereto, generally known as the Manitoba Acts; (6) that if the plaintiffs made a sale of the said lands the contract was not in writing, and shortly after lands fell greatly in price, and the purchasers by reason thereof would not complete title, &c.; (6) that the defendant Cameron made no representations to the plaintiffs for the purpose of inducing them to accept title and complete the purchase, &c., but that the plaintiffs relied upon their own investigation of title, &c.; (8) that no representations made by the defendants were untrue to their knowledge, and that any representations made by them were made by them fully believing the same were true; (9) that the plaintiffs never had any remedy or claim against them in respect to the matters alleged, but if any such claim ever did exist the plaintiffs have by their delay laches and acquiescence deprived themselves of all right or claim against them in the premises.

The notice of motion stated the following grounds: That upon the evidence the plaintiffs are entitled to a judgment for rescission of the contract and delivery up for cancellation of the promissory note in the pleadings

mentioned and a return of the moneys paid by them under the said contract, and that they are entitled to reimbursement of the amount expended by them in connection with investigating the title to the lands in the pleadings mentioned; and upon the ground that the learned Judge erred in holding that the plaintiffs' conduct, the correspondence and the lapse of time established an election on their part to affirm the transaction, and upon the ground that the said judgment is against law and evidence, and the weight of evidence, and upon grounds disclosed in the pleadings and proceedings herein and the evidence adduced at the trial.

The facts, so far as it is necessary to consider them, are as follows: The defendants, as executors or trustees under the will of the late Ellis W. Hyman, in January, 1882, supposed they owned and that the Crown Patent had issued for lots 37 and 39 in the parish of St. Clements, Manitoba, in the neighbourhood of Selkirk, at which time speculation in lands in that part of the country was rife. The plaintiff Cameron and the defendant Cameron met in Winnipeg, and the latter as one of the trustees entered into an agreement in writing, bearing date January 17th, 1882, with the former for the sale of these two lots for \$5450, payable as follows: \$1791 on the delivery of the deeds, and upon the title to said lot 37 being found satisfactory to the party of the second part (plaintiff Cameron), or his solicitor, and upon a quit claim deed of said lot No. 39 being delivered, &c., the balance \$3634 to be secured by first mortgage on said property, payable in six and twelve months from the date thereof, with interest, &c., said sale to be completed and carried out within 30 days, otherwise the deposit now made upon the same of \$25 to be forfeited. The defendant Cameron represented to the plaintiff Cameron that lot 37 was a patented lot, that is, a patent from the Crown had issued for it, and the plaintiff, relying on that representation, entered into and executed the agreement. On the faith of this representation, which both parties believed to be true, the plaintiff afterwards



made a verbal agreement to sell lot 37 to Ross on the 28th day of the same month at a price greatly in advance of the purchase money, and which is stated in the deed conveying the same to Ross to be \$30,000. This deed was not delivered, but was in the hands of Ross's solicitor to be accepted by him on the production of the patent or satisfactory evidence of its having been issued by the Department of the Interior, when Ross was to pay his purchase money.

The two Camerons were warm personal friends, each having implicit confidence in the integrity of the other.

McKenzie & Rankin, a firm of solicitors in Winnipeg, were the solicitors of the Hyman estate there, and the defendant Cameron took the plaintiff Cameron to the office of this firm for the purpose of having the conveyances prepared, and both parties, *i. e.* the Hyman estate and the plaintiff Cameron were charged in the books of the solicitors with work done in reference thereto.

[The learned Judge then proceeded to review the evidence in detail, setting out the correspondence which took place between the plaintiff Cameron and the defendant Cameron in reference to the fact that the department refused to issue the patent, and in reference to rescinding the sale, and summing up the effect of a portion of the evidence as follows :]

The plaintiff Cameron bought as the defendant Cameron knew for speculative purposes. On the morning after the execution of the agreement of January 17th, the defendant Cameron left Winnipeg and came to his home in Hamilton. The plaintiff Cameron remained in Winnipeg for the purpose of disposing of lot 37, and in the course of eleven days thereafter entered into the arrangement before referred to with Ross for its sale to him. On the execution of the agreement between the two Camerons, the deeds from the defendants to the plaintiff Cameron were, without waiting to examine into the title at once prepared, and sent off by McKenzie and Rankin to the defendants for execution, and and they were executed on February 10th, and returned

to McKenzie and Rankin at Winnipeg, who informed the plaintiff Cameron of the fact, and they were afterwards registered by them on March 11th, and the registry fee charged to the plaintiff Cameron. It does not appear how long after their execution it was, that they were received in Winnipeg, but judging from the evidence, it must have been only a day or two before they were registered. Up to this time search was being made for the patent, as the parties were anxious to complete the sale and transfer to Ross, but it could not be found. McKenzie and Rankin then on March 27th, having ascertained from the Department of the Interior that the patent had not issued, communicated the fact to the plaintiff Cameron, who on the same day wrote to the defendant Cameron notifying him.

[The learned Judge continued :]

The learned Judge at the trial found, after expressing a doubt as to whether the plaintiffs could maintain this action in its present form, he having found that the defendant Cameron had an interest with the other plaintiffs in the purchase from Hyman's estate, as follows :

" I find that in making the agreement on the 17th day of January, 1882, and in carrying out the same, both parties acted under the honest but mistaken belief that the patent for lot 37 had been actually issued. It may be, however, that the law would impute to the defendants the knowledge of their own title, and so the knowledge that it had not been issued. But the agreement was to be carried out in thirty days, and the purchase money was to be payable upon the title of lot 37 being found satisfactory to the vendee or his solicitor. It seems difficult, having regard to this stipulation and in the absence of actual fraud, that the carrying out of this agreement can be rescinded. See *Attwood v. Small*, 6 Cl. & F. 232, and *Thomas v. Crooks*, 11 U. C. R. 579 ; but see, also, *Hart v. Swaine*, 7 Ch. D. 42 ; *Joliffe v. Baker*, 11 Q. B. D. 255 ; *Palmer v. Johnson*, 13 Q. B. D. 351 ; *Newbigging v. Adam*, 55 L. T. N. S. 794.

"I am of opinion, however, that the plaintiffs cannot succeed, because their conduct as appearing upon their evidence, and the correspondence, added to the lapse of time which took place after they knew of the defect in title, and before they sought to disaffirm the transaction, established an election on their part to affirm the transaction within the principles laid down in *Clough v. London and North Western R. W. Co.*, L. R. 7 Ex. 26.

"The lands were of a purely speculative value, and the transaction ought to have been disaffirmed promptly. See *Lee v. MacMahon*, 11 A. R. 555.

"I direct, therefore, that judgment be entered in this cause on and after the fifth day of next Easter Sittings, dismissing this action, with costs."

I have found it necessary to go very fully into the facts and circumstances of this case as they came out in evidence, in order to form a conclusion satisfactory to my own mind, and therefore have set out almost in extenso the material evidence taken at the trial. These circumstances are somewhat peculiar, and are not the same as in any of the cases cited or that I have been able to find.

It is manifest that the plaintiff Cameron relied implicitly on the representations made as to the title by the defendant Cameron before and at time of the sale, and had it not been for the fact that one of the grantors, Mrs. Hyman, was then absent, in fact, residing in London, Ontario, the agreement set out in the proceedings would not have been executed by the two Camerons, but instead thereof the deed purporting to convey the lands in fee simple in the first instance; and that is made manifest by the evidence put in on the part of the defendants, of the witness Golding, who says: "The deeds for the land in question were prepared by McKenzie & Rankin by instructions from both parties, Mrs. Hyman being absent in London, Ontario, and the whole transaction for the purchase and sale of the lands having been effected by the plaintiff Cameron and the defendant Cameron in the city of Winnipeg, the agreement for the purchase of the lands

was drawn up and executed pending the arrival of the deeds of the property in question properly executed by Mrs. Hyman, one of the defendants." So that I think it reasonable to consider the case from the point of view here suggested, viz., that had Mrs. Hyman been at Winnipeg at the time, the agreement in writing would not have been drawn up or executed, but the deed in the first instance. And this is important in the view taken by the learned Judge as expressed in his judgment in reference to that part of the agreement which declares that the sale shall "be completed and carried out within thirty days, otherwise the deposit now made upon the same of \$25 to be forfeited."

After a careful perusal and consideration of the whole of the evidence, and especially the correspondence which took place immediately after it was ascertained beyond doubt that the patent had not only not been issued, but that the Department had refused to issue it to Hyman's estate, and the reasons given therefor between the two Camerons, I cannot come to any other conclusion than that had the defendants then taken the stand that they did afterwards, and do now, the plaintiffs would have been entitled to have the conveyance made rescinded, notwithstanding the execution of the deed now relied upon, as being accepted by the plaintiffs. The best proof to my mind that the defendants felt that they were then bound to make good their representations as to the patent having issued or to rescind the sale, will be found in the fact that they at once set to work to make their claim to the lot good before the Department of the Interior. The defendant Cameron not only immediately wrote most imperative instructions to the solicitors of the estate in Winnipeg to take all necessary steps to satisfy the Government, but he himself shortly after, finding that the business was not being proceeded with as promptly as it should, went to Winnipeg and there took the matter into his own hands, and procured the necessary affidavit and proof shewing the claim of the estate to the



lands. This it appears, however, was not considered satisfactory, because one Thompson claimed to own the property as against the defendants. It should not be lost sight of either that the plaintiff Cameron and the defendant Cameron were warm personal friends, and the long letters of assurance from the latter to the former that all would be made right immediately, influenced him to have faith that all would be satisfactory in ample time to enable him to carry out the advantageous sale he had made to Ross. It is absurd, according to my judgment, to pretend that there was any investigation into the title before the deeds were drawn or the money paid on the purchase. These deeds were prepared and sent off for execution almost if not quite co-terminously with the agreement, and taking into account the delay that was at this particular time caused by the immense rush of business in the offices of the solicitors at Winnipeg, together with the length of time it then took to forward papers by post between Winnipeg and London and Hamilton, and for return, it is not reasonable to suppose that the thirty days for looking into title was taken into consideration at all. Another circumstance shews that this was not so. The agreement was executed on January 17th. The sale to Ross was made on the 28th of the same month, and more than that the deed from the defendants to the plaintiff Cameron was executed in London and Hamilton on February 10th, seven days before the thirty days had expired, and bears evidence on its face that it was written in January, and it is evident the bulk of the purchase money, \$4,025, was paid before the deed was signed by the defendants, as we find in the letter written by defendant Cameron to the plaintiff Cameron on February 10th, informing the latter that the deeds had on that day been sent to London from Hamilton to Mrs. Hyman for execution, that he therein states that this sum of \$4,025 had been already paid, and proposing to take the plaintiff, Cameron's, note, endorsed by "the captain," for the residue of the purchase money instead of the mortgage, as mentioned in the agreement, with

which request the plaintiff at once complied, so that the thirty days mentioned in the agreement was never acted upon by either party.

Then again, what investigation of title could take place? The registry office would afford no evidence of the patent having issued, even had it been a fact. The registry laws of Manitoba, as I know, do not require like those of Ontario that the registrar shall enter in his register the issue of the patent, unless the patentee or his grantee produces the patent with a verified copy for registration; then, and not till then, is there any entry in the books of the registrar that the patent has been issued.

That there was gross carelessness or great misconception on the part of those who had the management of the Hyman estate is evident if we are to believe the evidence of the witness Golding, because he says that there was a letter from the Department of the Interior stating that the patent would issue to the heirs of Hyman, and he says Cameron, the plaintiff, was told this, in fact, he says he, the plaintiff, saw that letter, but this is denied by the plaintiff, and it is manifest that no such letter ever was written by the Department, all of which goes to shew how reckless the vendors were in making statements in reference to their title.

And besides all this, the evidence not only of Golding but the other witnesses who had anything to do with the business in Winnipeg proves distinctly that the title was not investigated at all, in fact, Golding says he did not pass the title, and he is the person who attended to the business and the drawing the conveyances, &c., for both parties; and that the plaintiff Cameron was not told that the defendants had a good title by him nor by anyone else in the office of McKenzie & Rankin, the solicitors; further, that he knew the defendants had nothing more at the time than an equitable title.

So far as the plaintiffs were concerned one and all, especially Cameron, did everything in their power to assist the defendants in procuring this patent, but all that could

be done by both parties availed nothing, in fact it was impossible for the defendants it appears to make their title good, and it was not until April 25th, 1883, that they succeeded in satisfying the Department, and then only that they had a claim to four chains of the lot, so that ninety links were still outstanding, while the whole lot was sold according to the agreement.

In the meantime, the "boom" which was in existence at the time of the purchase had spent itself. Speculators were becoming shy. Lands could not be sold, and Mr. Ross withdrew his offer, and the lands are now left on the plaintiffs' hands. Before this, however, and before the Department had decided in favour of the defendants' claim to the lands, the plaintiff Cameron and Long called upon the defendant Cameron, in Hamilton, in the latter part of January or early in February, 1883, and he, the plaintiff, then and there told the defendant Cameron that he would not keep the property: that he, as the defendant Cameron well knew, had bought it for speculative purposes: that by reason of no patent being issued he had been unable to carry out a most advantageous sale: that the object of his purchase had been frustrated, but that all he wanted was, not damages for the loss he had sustained by reason of the misrepresentation made as to the patent, but his money back, with interest, and the actual expenses he had been put to by reason thereof.

In my judgment that was an election by the plaintiffs, had it been open to them at this time to elect against the conveyance of February 10th. They had forborne as long as they could see the slightest chance of getting the patent and disposing of the property as had been agreed, to Ross, at the urgent solicitations of the defendants. Now, how did the defendant Cameron meet this demand? He did not pretend to say that the sale was absolute when the deed was accepted and the money paid, nor did he claim protection under the thirty days' clause of the agreement, but he agreed to communicate with his co-trustee and see what could be done, and to write the plaintiff Cameron

the conclusion come to. This, however, he neglected for reasons best known to himself, nor did they apparently make up their mind until after the receipt of a letter from the plaintiff Cameron of March 1st, written in most urgent terms, requesting to be informed by return of mail "what the decision is in regard to the matter," and then even another month's delay took place before an answer was sent, which was dated April 4th, when the defendant Cameron wrote to say that the sale would not be cancelled; and the plaintiff in reply wrote that if the defendants did not re-consider the matter he would take proceedings, &c.

These are the facts, and it is now in order to consider whether the plaintiffs have no remedy as the law now stands on this branch of the case, because the learned Judge whose judgment is appealed against has not, except by inferences, decided that the plaintiffs would not be entitled to recover had he not found against them on other grounds.

The finding of the learned Judge, however, is instructive, viz.: "that in making the agreement of January 17th, 1882, and in carrying out the same, both parties acted under the honest but mistaken belief that the patent for lot 37 had been actually issued." And the learned Judge goes on to say: "It may be, however, that the law would impute to the defendants the knowledge of their own title, and so the knowledge that it had not been issued. But the agreement was to be carried out in thirty days, and the purchase money was to be payable upon the title to lot 37 being found satisfactory to the vendee or his solicitor. It seems difficult, having regard to this stipulation, and in the absence of actual fraud, that the carrying out of this agreement can be rescinded." Treating the execution of the conveyance as the 'carrying out of the agreement,' I think, on the authorities, the learned Judge has come to a proper conclusion, but it appears to me that there are circumstances and peculiarities connected with this case which do not leave the conclusion come to free from doubt, and in this respect, I think, if I understand the



learned Judge aright, he participates ; and further, that if the deed of February 10th, 1882, was not in the way the agreement of January 17th, 1882, should be rescinded and the plaintiffs relieved from being obliged to carry the same out, and the defendants ordered to refund the purchase money and deliver up the promissory notes to be cancelled. And in my judgment the cases cited in support of that contention by Mr. McCarthy declare the law to be clear on this point.

In *Redgrave v. Hurd*, 20 Ch. D. 1, Jessel, M. R., at p. 12, states the law now to be,—the operation of the Judicature Act making the rules of equity prevail,—“ According to the decisions of Courts of Equity it was not necessary in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was : ‘ A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false ; he ought to have found that out before he made it.’ The other way of putting it was this : ‘ Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is moral delinquency. No man ought to seek to take advantage of his own false statements.’ \*

\* The doctrine in Equity was settled beyond controversy, and it is enough to refer to the judgment of Lord Cairns in the *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64.” And the Master of the Rolls states at p. 13 another proposition of law which is most pertinent to this case : “ If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say : ‘ If you had used due diligence you would have found out that the statement was untrue. You had the means

afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance, but also as regards rescission, that this is not an answer, unless there is such delay as constitutes a defence under the Statute of Limitations."

Now, apply these rules to this case and what have we? The defendant Cameron represented that the patent had issued. He produced a memorandum, according to his own testimony, written by the manager of the Hyman estate, made for him at his request prior to his going to Manitoba, no doubt with the view of taking advantage of what was called "the boom in real estate." That memorandum stated that as to "lot 37 the patent granted January 2nd, 1881." He also says, in corroboration of plaintiff Cameron's contention, in the letter of April 6th, 1882. written after it was discovered that the patent had not only not issued, but "had not really been granted, and that further evidence will be required before it is granted," "I sold it in perfect good faith, fully believing that the estate had the right to sell it, and that the patent had been granted."

Now, these facts bring this case within the rules laid down by Jessel, M. R.

There is one thing certain, that without a day's delay, after it was discovered that the patent had not nor would be issued to the Hyman estate, the defendants were made aware of the fact, and their insisting now, and from the time the plaintiffs told them that they would not keep the property, and demanded their money, &c., back, is nothing less than "moral delinquency," which is another way of expressing that a man is guilty of moral fraud, and in my judgment something more, and he should not be allowed "to take advantage of his own false statements," or in other words, of his own wrong.

Then as regards the paragraph in the agreement of January 17th, which states: "Said sale to be completed and carried out within 30 days, otherwise the deposit now

made upon the same of \$25 to be forfeited," which Mr. Justice Armour holds to be an important factor in the absence of actual fraud against rescinding the conveyance, there is authority for holding that intention is also of great and, in fact, paramount importance in cases of this kind; and in my judgment the real intention of both parties was to make this contract only on the basis that the patent had been granted. Apart from the declarations of both under oath and the statement of the defendant Cameron in the letters written by him before referred to, we have the important fact that the purchase money, at least \$4,000 of it, was paid by plaintiff Cameron before he had received the conveyance from the defendants, which goes to shew that this clause was not in contemplation at all between the parties, nor was it acted upon by either; in fact, if we are to assume that defendant Cameron acted as he said he would when he wrote the letter of February 10th, 1882, the promissory note was to be sent to him signed by plaintiff and endorsed by "the Captain" before he would send forward the deeds for delivery. His words are: "On receipt of this note made by you and endorsed by the Captain, bearing interest at eight per cent., payable six months from date of sale, I will have deeds sent to Winnipeg." But apart from this the plaintiff had an undoubted right to rely on the defendants' statement as to the patent being granted. These men did not stand at arm's length then; they were warm personal friends; had unlimited confidence in the probity of each other. And particularly so was this the case so far as the plaintiff Cameron was concerned in reference to the defendant Cameron. But apart from that even it does not lie in the mouth of the defendants to say: "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of it."

But let us for a moment consider what this proviso in the agreement really means. 1st. It is declared that the purchase money for the two lots is to be \$5,450, payable

as follows: "The sum of \$1,791 to be paid on the delivery of the deeds of the said property hereby described, and upon the title to said lot 37 being found satisfactory to the said party of the second part or his solicitor, and upon a quit claim deed of said lot 39 being delivered over to said party of the second part or his solicitor, the balance, or the further sum of \$3,634, to be secured by first mortgage upon said property, payable and to be paid in six and twelve months from date thereof, with interest thereon at the rate of 8 per cent., &c., and sale to be completed and carried out within thirty days, otherwise the deposit now made upon the same of \$25 to be forfeited."

It is clear that this was not acted upon by either party, because the vendee paid \$4,025 before he received any deed at all and before the title to lot 37 was found to be satisfactory. The solicitor of the vendee, who was also solicitor for the vendors, says it was not satisfactory, and could not be said to be satisfactory either at the time the money was paid, or at the time when the deeds were signed, or afterwards when they were delivered. Yet the agreement says if the sale is not carried out within thirty days the deposit made by the vendee is to be forfeited. Now, when does the thirty days begin to run? I submit according to the nature of the facts presented not until the title is found to be satisfactory, &c.—at least that is the only reasonable construction which, in my judgment, can be put upon it. If otherwise, the vendee might be made to pay the purchase money before the title was found to be satisfactory or forfeit his deposit, the fault being no fault of his. So that the vendee might say:

1st. I agreed to purchase this property on your representation that you had a good title in fee from the Crown.

2nd. Relying on that representation, I paid you in advance at your request, and before the fact was ascertained, the bulk of the purchase money, and before the deeds were executed, the understanding being that I paid the money and accepted the deeds without prejudice to my rights, the patent from the Crown to be forthcoming without delay.



3rd. Your representations have turned out to be untrue, not wilfully so I admit, but I bought the land, as you knew at the time, for speculative purposes. You could not fulfil your part of the contract within a reasonable time. The object I had when I purchased has been lost to me, and, therefore, I decline now to keep the lands, and require you to repay me the amount paid, &c., I being willing to re-convey to you all the title you gave to me by your deed of February 10th, 1882. In other words, "I paid the purchase money and accepted the deed without prejudice to my right to cancel the conveyance upon your failing within a reasonable time to make a good title, according to your representation." But unfortunately this is not the case stated on the record, nor is it the case presented before us on the argument, but the evidence suggests that it is barely possible such a case might be sustained by the plaintiffs, but as to which I do not offer any opinion. In my judgment the pith of the case presented is contained in the 9th paragraph of the statement of claim, which is as follows :

"After the said purchase money had been paid and conveyances of the said land duly made to the plaintiff Cameron, the title deeds of the said lands were demanded from the defendants' solicitors at Winnipeg, in Manitoba, but the said solicitors failed to furnish the same, and the plaintiffs then for the first time learned that the defendants were not in possession of the Crown grant of the said lands, and the plaintiffs thereupon requested from the defendants an explanation of this defect in the plaintiffs' title, and learned in the course of communications with regard thereto that the said Crown grant had never been issued to the defendants for the said lands, but that the title was still in the Crown, and after further and extended correspondence and interviews with the defendants the plaintiffs ascertained that the defendants were not entitled to such Crown grant, and that the Department of the Interior refused to issue the same, and that the defendants could not make a title to the said lands, and in conse-

quence the plaintiffs lost the opportunity of making sales thereof."

And the learned Judge finds that there was no fraud ; that in making the agreement, and in carrying out the same, both parties acted under the honest but mistaken belief that the patent for lot 37 had been actually issued, and both counsel before us argued on the same lines. Now, this being the case, the plaintiffs are met with the principles laid down in *Wilde v. Gibson*, 1 H. L. Cas. 605, as confirmed in the later case of *Brownlie v. Campbell*, 5 App. Cas. 925. In the former Lord Campbell says at p. 632 : "If there be in any way, whatever, misrepresentation or concealment, which is material to the purchaser, a Court of Equity will not compel him to complete the purchase, but where the conveyance has been executed \* \* a Court of Equity will set aside the conveyance only on the grounds of actual fraud."

Now, the case presented to us is one of "conveyance executed," and it is only after that that the plaintiffs say in their case and on the argument that they discovered that "the defendants were not in possession of the Crown grant," and further, that there was no actual fraud or deceit in the representations made by the defendants as to the issuing of the patent. I confess I am at loss to understand why there should be this distinction between an executory and an executed contract. If it is wrong for a man to insist upon the carrying out of a contract just as solemnly entered into for the purpose of witnessing that the parties have agreed, the one to buy and the other to sell a piece of property, because the vendor has made a misrepresentation or concealment which is material to the purchaser, and which he acted upon, the misrepresentation having been made in the *bonâ fide* and honest belief that it was true, although it afterwards turned out to be untrue, —the mere formal act of the execution of a conveyance of the property, and no more, should not make it right. I confess I cannot see why it should be so.

Lord Campbell says : “ there would be no safety for the transactions of mankind if upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser, of which the purchaser had merely constructive notice, a conveyance which had been executed could be set aside.” And one cannot but subscribe to the proposition as his Lordship puts it. But this was not the case of an undisclosed material fact, but the assertion that a material fact had happened. Every case should stand on its own merits and be governed by the actual circumstances connected with it, and not on the general principle that because a conveyance has been executed the vendee shall be in all cases, unless he is able to shew actual fraud, without remedy no matter how great the injury he has suffered, and, therefore, I feel that in following so great an authority as I am bound to do, nevertheless I am doing violence to my own judgment as to what is right between man and man in their transactions with one another. As already stated, the circumstances in the case before us are peculiar and in no manner, except in the fact of there being a conveyance executed, like that of any other case that I have been able to find in the books, but as there seems to be no exception to the rule laid down in *Wilde v. Gibson*, 1 H. L. Cas. 605, that case must govern, and the plaintiffs be concluded by it.

FERGUSON, J.—The learned Judge found on the evidence that the plaintiff Charles Cameron purchased for a company composed of one Stevens, McMullen, Earle, the defendant H. D. Cameron, and himself : that the plaintiff Peter Campbell became entitled to the interest of Stevens, and the plaintiff Long became entitled to the interest of Earle therein, and remarked that it might be difficult for the plaintiffs under this finding to maintain this action, at all events in its present form, referring to *Atwood v. Small*, 6 Cl. & Fin. 232. On the argument before us it was distinctly stated that no objection was taken nor any advantage sought by reason of this finding or state of facts.

The learned Judge also found that in the making of the agreement of January 17th, 1882, and in carrying out the same, both parties acted under the honest but mistaken belief that the patent for lot 37 had actually issued, saying that it might, however, be that the law would impute to the defendants the knowledge of their own title, and so the knowledge that it had not been issued, and continued by saying: "But the agreement was to be carried out in thirty days, and the purchase money was to be payable upon the title to lot 37 being found satisfactory to the vendee or his solicitor." The learned Judge then said: "It seems difficult, having regard to this stipulation and in the absence of actual fraud, that the carrying out of this agreement can be rescinded," referring to *Attwood v. Small*, 6 Cl. & F. 232; *Thomas v. Crooks*, 11 U. C. R. 579; *Hart v. Swaine*, 7 Ch. D. 42; *Joliffe v. Baker*, 11 Q. B. D. 255; *Palmer v. Johnson*, 13 Q. B. D. 351; and *Newbigging v. Adam*, 55 L. T. N. S. 794, 35 W. R. 597.

On the argument before us it was admitted that the representation had been honestly made, although it turned out that it was not in accordance with the fact. The defence contended that such being the character of the representation there cannot, after the completion of the transaction and the execution of the conveyance, be rescission at the instance of the purchaser, relying upon the cases before mentioned, except *Hart v. Swaine*, 7 Ch. D. 42, and also referring to *Dinsmore v. Shackleton*, 26 C. P. p. 604, and *Wilde v. Gibson*, 1 H. L. Cas. 605.

For the plaintiffs it was contended that *Hart v. Swaine*, 7 Ch. D. 42, is a clear authority for the proposition that a purchaser may claim and have a rescission after the conveyance executed, on the ground that a material representation which induced the making of the transaction was untrue in fact, though honestly made; that is to say, on the ground of what has been called legal fraud, and where there has been no dishonesty or deceit in making the representation. It was said and contended that where



there has been fraud, either legal or moral, and whether the property is real or chattel, there may be a rescission or other remedy, and this after conveyance executed.

The case *Hart v. Swaine*, looking solely at the grounds on which the learned Judge rested his decision, would seem to support this contention. In the case *Joliffe v. Baker*, 11 Q. B. D. 255, the learned Judge delivering the judgment of himself and that of Mr. Justice Cave, said at page 259, in reference to *Hart v. Swaine*: "This decision, if I may say so without appearing impertinent, is equally consistent with sound law as with sound sense, but the reasoning upon which it is founded is, if I may say so without presumption, unsatisfactory, and has proved misleading." And further on, at p. 260, it is said that *Hart v. Swaine* can scarcely be cited as an authority in support of the doctrine that the so-called legal fraud without actual moral fraud is a sufficient ground for setting aside a conveyance, and that there was in that case ample evidence of fraud in the common meaning of the term; and reference is made on p. 259 to the fact that in *Hart v. Swaine* the defendant had, before he sold to the plaintiff, put up the land for sale by public auction, and that on that occasion a Mr. Smith publicly stated in the auction room that the land was copyhold and not freehold, and that no sale was then effected. (The representation relied on in the case was the contrary of this.)

In the case *Wilde v. Gibson*, 1 H. L. Cas. at pp. 632 & 633, Lord Campbell is reported to have said: "If there be, in any way whatever, misrepresentation or concealment which is material to the purchaser, a Court of Equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a Court of Equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind, if upon a discovery being made at any distance of time of a material fact, not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside."

In view of the case *Hart v. Swaine* and some remarks appearing in some other cases, the idea seemed to have gained some ground that the statement of the law in *Wilde v. Gibson*, though of the highest authority, cannot now be relied upon as being quite accurate. It is true that the decision took place as long ago as the year 1848, but the decision in the case *Brownlie v. Campbell*, in the House of Lords, 5 App. Cas. 925, in the year 1880, as I understand it, follows the statement of the law in *Wilde v. Gibson*. At p. 937 Lord Selborne, L. C., after referring to the law of Scotland, says: "It appears to me that the cases which have been decided in this country and in Ireland are to the same effect. During the course of the argument I called the attention of the learned counsel for the appellant to what was said in the judgment given in this house by Lord Cottenham in the well known case of *Wilde v. Gibson*, 1 H. L. Cas. 620, and more particularly to the case of *Legge v. Croker*, 1 Ball & B. 506, referred to there with approbation, which was before Lord Mannors in Ireland, and which had in some respects a close resemblance to this case. There a positive statement was made that there had been a decision against a right of way. It was *bonâ fide* believed that there had been such a decision, but when it was examined it was found not to exclude every sort of right of way, but only a certain kind; and one other kind not excluded by it remained and was eventually established. That representation having been believed to be true at the time it was made, and having been made in good faith, it was held, after conveyance, by the Court, that it was no ground for relief in Equity, either by way of compensation or by setting aside the contract."

The Lord Chancellor then refers to *Hart v. Swaine*, 1 Ch. D. 42, and amongst other things says that the representation there relied on was made under circumstances bringing home knowledge as strongly as anything in the world could do to the person who made it, and that there was, besides, an express covenant which shewed that as between the vendor and purchaser no such risk was meant

to be undertaken. Lord Selborne then proceeds with the judgment by saying: "Now, these being the principles, the question remains as to the facts," &c.

It seems to me that the case *Brownlie v. Campbell* is an affirmance of the law as contended for by the defendants. The 9th paragraph of their statement of claim shews that the relief is sought after conveyance completely executed. The finding of the learned Judge and the statements and concessions made in the argument before us shew that what the plaintiff relied on for the rescission claimed is not actual fraud, not moral fraud, not deceit, but only a representation believed to be true (at the time), but which turned out to be untrue, and applying the principle asserted, as I understand, in both cases in the House of Lords, above mentioned, to the now undisputed facts of the case, and seeing also what has been more than once said of the case *Hart v. Swaine*, I am unable to perceive how the plaintiff can succeed, and I am of opinion that the judgment should be affirmed.

A. H. F. L.

## [CHANCERY DIVISION.]

## SADERQUIST V. THE ONTARIO BANK.

*Banks and Banking—Non-negotiable deposit receipt—Fraudulent receipt of the money—Laches—Notice—Estoppel by conduct.*

The plaintiff, an ignorant man and a foreigner, deposited a sum of money with the defendants on 24th September, 1884, and received from them a non-negotiable deposit receipt for the amount, in which it was stated that the defendants would "account to" the plaintiff therefor, &c. At the same time the plaintiff's signature was left with the defendants for the purpose of identification. The plaintiff left the receipt with one S.S., for safe keeping and went away. He returned in April, 1885, when S.S. informed him that he had drawn the money and promised to return it. The defendants had paid the money without proper identification and without comparison of the signature of S.S. with that of the plaintiff. Ignorant of the method by which the money had been obtained and of his rights against the defendants the plaintiff did nothing further, and S.S. left the country in August following, heavily indebted. Subsequently, in December of the same year the plaintiff was informed of his rights, and consulted a solicitor, who promised to attend to the matter but failed to do so. In April, 1886, the plaintiff consulted another solicitor when a demand was made on the defendants and on their refusal this action was brought. This demand was the first intimation to the defendants of the fraud practised on them.

*Held*, [reversing the judgment of ARMOUR, J., at the trial] that as the plaintiff's delay was not suggestive of collusion or of any unfair dealing on his part, his failure to make a demand on or sue the defendants, when he first heard his money had been obtained by S.S., did not operate against him so long as his claim was not barred by the Statute of Limitations.

*Held*, also, that no legal duty was cast on the plaintiff to notify the defendants, and thus an essential element of estoppel by conduct was absent.

*The Merchants Bank v. Lucas*, 13 O. R. 520, distinguished.

THIS was an appeal to the Divisional Court from the judgment given at the trial.

The action was brought by Swan Saderquist against the Ontario Bank, and was tried at the Assizes held at Port Arthur on June 11th, 1887, before Armour, J., without a jury.

It appeared that the plaintiff had on September 24th, 1884, deposited the sum of \$650 in the Ontario Bank, and had received a deposit receipt (set out in the judgment of Boyd, C.) therefor, which he had handed to his friend Swan Sanquist for safe keeping, and then went away to work on a railway. He returned in April, 1885, and



asked for his receipt, when Sanquist told him that "he had drawn the money on it, but would pay him back." The plaintiff was an ignorant man, and did not think he had any remedy against any one except Sanquist, until he was told in the following December, by some of his fellow-workmen, that he had the right to recover the amount from the bank. On being so informed he consulted a solicitor, who told him he would see about it, but did nothing.

In April, 1886, he consulted another solicitor, and a demand was then made upon the bank, and refused, and the writ in this action was issued. This demand was the first notice the bank had that the wrong man had drawn the money. Sanquist had, in August, 1885, left Canada and gone to the States heavily in debt.

The deposit receipt issued in the name of S. Soderquist\* was put in, having the signatures "S. Soderquist" and "Ole Brand" endorsed on the back, and Brand testified at the trial that he had gone to the bank at the time the money was drawn, and identified Sanquist as Sanquist, with whom he was well acquainted, but that he knew nothing of whose property the deposit receipt was, whose name was in it, or, in fact, any particulars concerning it.

*G. T. Blackstock* appeared for the plaintiff.

*A. R. Lewis* for the defendants.

At the close of the evidence :

HIS LORDSHIP.—What have you to say, Mr. Blackstock ?

*Mr. Blackstock*.—I submit I am entitled to judgment for this sum of money. I do not know on what ground my learned friends can resist it.

HIS LORDSHIP.—The difficulty is the ground of estoppel. The case *The Merchants Bank v. Lucas*, 13 O. R. 520, has gone to the Court of Appeal. I think in the Court of Common Pleas it was held that even the loss of the oppor-

\*So mis-spelt in the receipt and endorsement.—REP.

tunity to prosecute a person criminally created an estoppel.

*Mr. Blackstock.*—Certainly there is no case of that kind made out here. It is perfectly clear this man was never worth a dollar, and under a judgment nothing could be recovered; but I submit independently of that in this case, the damage having been done, there having been no kind of representation prior to the time the tort was committed by Sanquist, there was no duty cast upon this man to do more than he did do, no legal duty. Of course a moral duty probably there was, but in addition to that one has to take into consideration the circumstances of such a man as this; evidently he did not know what his rights were.

HIS LORDSHIP.—He might have gone to some person who could tell him.

*Mr. Blackstock.*—He appears to have gone to Mr. Wink on the first occasion, and all he does is, he tells him he would see Sanquist about it, and the plaintiff gets no advice till Whelan, with whom he is working, whom he informs of the circumstances, says he will enquire for him and he does so, and they go to the bank together.

HIS LORDSHIP.—I think the case of *The Merchants Bank v. Lucas* goes a long way, and I think the principle of that decision is applicable to this case.

Where one of two innocent persons must suffer from the fraud of a third, that one ought to bear the loss whose greater negligence has contributed to the perpetration of the fraud. The plaintiff is that one. By entrusting this receipt to the man who committed the forgery, he enabled him to commit it. True, he gave him no authority to deal with it, but he put it in his power to do what he did with it—to forge his endorsement and draw the money. Then what was the plaintiff's conduct when he ascertained from the party himself to whom he had entrusted the receipt, that he had forged the endorsement, and drawn the money? He seems, according to his evidence, to have relied on the promise of the person who drew the money for its repayment, and he says nothing to the defendants.

about the matter until this Spring. They are not informed till this Spring. Well, it may be that any proceedings they might have taken against Sanquist would have been futile ; yet I think in order to save himself he should have given the notice in order that they might have taken proceedings against Sanquist to try to get the money from him. I think on the decision of *The Merchants Bank v. Lucas* I must hold the plaintiff not entitled to recover. I think that case goes a long way, yet at the same time I consider I am bound by it ; still, if the parties wish, it may be desirable for them to take the opinion of the Chancery Division, in which the action is.

From this judgment the plaintiff appealed, and the appeal was argued on September, 7, 1887, before Boyd, C., Proudfoot and Ferguson, JJ.

*Ritchie*, Q.C., for the appeal. The whole question here is, does the plaintiff's delay of one year, from April, 1885, to April, 1886, bar him by way of estoppel ? [BOYD C.—If proceedings had at first been taken against Sanquist could the money have then been made ?] The evidence shews it never could have been made. [BOYD, C.—But is not the bank in a worse position now than it would have been then ?] Even if that were so the *onus* is on them to shew it. To bar the plaintiff there must be some intention or wilful act that his conduct should produce a certain result, and that was not the case here. The damage here was done through no default of the plaintiff. In *Merchants Bank v. Lucas*, 13 O. R. 520, followed by the learned Judge at the trial, and relied on by the defendants, there was a direct representation as to payment intended to be relied upon, and the judgment there is based upon intention. In this case there was no act ; mere silence, and silence is not sufficient : *McKenzie v. British Linen Co.*, 6 App. Cas. 82. I refer, also, to *Freeman v. Cooke*, 2 Ex. 654, approved of in *McKenzie v. British Linen Co.*, *supra* ; *Walker v. Hyman*, 1 A. R. 353 ; and *Westloh v. Brown*, 43 U. C. R. 402.

*Falconbridge*, Q. C., contra. This case is covered by *Merchants Bank v. Lucas*, referred to by the other side, for the promise there was held to amount to nothing. The point was one of estoppel, and it was not necessary to shew that the bank had altered its position. This case is even stronger than that one was, for the evidence shews that the bank would have taken proceedings if they had known the facts, and the money might then have been made out of Sanquist by taking criminal proceedings. The intention referred to by my learned friend will be presumed.

*Ritchie*, Q.C., in reply.

September 10, 1887. BOYD, C.—The deposit receipt given by the defendants to the plaintiff is in these words :

\$650.

No. 25237.

THE ONTARIO BANK.

Paid up Capital, \$1,500,000.

PORT ARTHUR BRANCH, September 14th, 1884.

Received from S. Soderquist, Esq., the sum of six hundred and fifty dollars, for which this bank will account to the said S. Soderquist with interest at the rate of three per cent. per annum, provided the money remains not less than three months from date of deposit. Fifteen days notice to be given of its withdrawal, on which notice interest shall cease.

This receipt is to be given up to the bank when payment of either principal or interest is required.

For the Ontario Bank,  
(Sd.) R. N. KING,  
Manager.

Entered, D. A. RADCLIFFE, *Accountant*.

This instrument is not negotiable, and the delivery of it by the plaintiff to Sanquist for safe keeping conveyed no title or right to the money. If the plaintiff personally had presented the receipt and demanded payment he would be, in strict law, entitled thereto without endorsing his name on the receipt. But the bank, for the sake of precaution, appears to have adopted two tests as to the identity of receipt-holders ; one being to take his signature at the time of deposit for the purpose of comparison with his signature at the time of drawing the money ; and the other to have



his person identified by some trustworthy witness who was satisfactory to the bank. It cannot be said that the plaintiff exercised less care than the bank. In my opinion, assuming two innocent parties, the bank is the more blameworthy. The identification by Ole Brand appears to have been done in a very loose manner. His attention was not called to the name in the deposit receipt, and he is not asked to identify Sanquist, the applicant, with the Soderquist named in the certificate of deposit. The other test was still more carelessly applied. A moment's attention to the two signatures in juxtaposition—that of the *bonâ fide* owner and that of the applicant for the money who personated him—would have disclosed the fraud before the money was paid.

This fraud (and probably forgery) was perpetrated in October, 1884, but there is no proof that the plaintiff was even aware of the manner in which it was accomplished. When the plaintiff returned in April, 1885, he asked Sanquist for the receipt, and he (Sanquist) told him he had drawn the money upon it. The plaintiff appears to be an ignorant man, a Swede, and swears that he did not know he had any rights against the bank to recover the money until December of that year.

In August, 1885, Sanquist left that neighbourhood heavily in debt, and is said to have gone to the Western States; but it is not till April, 1887, that the plaintiff begins to prosecute this claim. That delay, however, is not suggestive to my mind of collusion or any unfair dealing on the plaintiff's part, but rather shews that he was not aware of his proper course till he took advice from his present solicitors. It does not seem to me that any legal duty was cast upon the plaintiff to advise the bank that it had been deceived in or after April, 1885. He might have claimed the money from the bank at that time, and he might have sued the bank also, but his failure to do either does not operate against him so long as his claim is not barred by the Statute of Limitations. Delay in the circumstances of this case is no defence to the bank. The

plaintiff did not know that Sanquist had assumed to sign his name, and as a matter of law that signature was not needed in order to draw the money.

The bank was imposed upon by Sanquist personating Soderquist, but the plaintiff did not know that it was in this way that the money was obtained. I take it that he supposed the mere possession of the certificate enabled Sanquist by a breach of trust with him to apply to the bank, and obtain the money upon delivering up the deposit receipt. This is no violent supposition when the language of *Stuart, V. C.*, in *Woodhams v. The Anglo-Australian, &c., Assurance Co.*, 3 Giff. 238, is read—language, however, which is explained in *Mander v. Royal Canadian Bank*, 20 C. P. 129. I fail to see any negligence attributable to the plaintiff when he left the receipt for safe keeping with Sanquist. He was not to suspect fraud, and assuming fair dealing it was a reasonable thing for him to do. No duty was cast on him to notify the bank of this deposit for safe keeping. Again, there was no negligence on his part which caused or contributed to the fraud, and that is in most cases an element of estoppel such as is relied on here: *Baxendale v. Bennett*, 3 Q. B. D. 530; *Magnus v. Queensland National Bank*, 35 W. R. 754.

The defence resolves itself into this: Had the plaintiff sued the bank earlier or reported the conduct of Sanquist in breaking faith with him to the bank in April, 1885, or before Sanquist absconded, the bank might have proceeded criminally against Sanquist, and might have recovered the whole or some part of the amount from him in civil proceedings. But the plaintiff knew of no forgery and of no personation, and was ignorant of his rights as to holding the bank liable, and it is familiar law that laches does not arise under such conditions.

Unless there was a duty imposed by law on the plaintiff to disclose to the bank that his friend had broken faith with him, there can be no negligence attributable to his silence, for negligence is a neglect of such duty,

If, as I think, no legal duty rested upon the plaintiff in the premises herein, one of the essential elements of estoppel by conduct is absent: *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 42.

The bank has to make out that the plaintiff's conduct amounts to confirmation of what was done by Sanquist, but his mere delay and inactivity falls far short of this. Quiescence is not acquiescence.

The whole injury was accomplished before the plaintiff was aware of it. Different might be the result if, while the transaction was going on, the plaintiff had known of it, and raised no objection, for then his conduct might be treated as an assent. The salient facts on which *The Merchants Bank v. Lucas*, 13 O. R. 520, turned are wanting here, *i.e.*, the commital of a crime to the knowledge of the party, his withholding that knowledge from the bank to its prejudice, his prevarication when questioned as to the signature, and his promise to pay on more than one occasion.

Upon the main matter discussed in *Merchants Bank v. Lucas*, *supra*, it is useful to refer to the *Patent Safety Co. v. Wilson*, 49 L. J. Ch. N. S. 713, and *Arnold v. The Cheque Bank*, 1 C. P. D. 578, which make against the defence pleaded herein, if it had been demurred to.

The judgment should be reversed and entered for the plaintiff for the amount claimed, and interest from the time notice was given, according to the terms of the receipt. Costs will follow the result.

PROUDFOOT and FERGUSON, JJ., concurred.

G. A. B.

## [CHANCERY DIVISION.]

## WELLS v. THE NORTHERN RAILWAY COMPANY.

*Railways—Subway—Easement—Prescription—Corporation—Consolidated  
Railway Act 1879—42 Vic. c. 9, s. 27.*

Where in building their road the defendants left a subway under a trestle bridge, and the evidence shewed that the plaintiff, the owner of the land crossed by the railway at this point, had enjoyed the open and continuous user of this subway as of right ever since 1862, but that the defendants were now proceeding to fill it up.

*Held*, that though the plaintiff could not prevent the filling up of the subway, he was entitled to damages for his property in the easement.

The plaintiff was entitled to assume that there was a reservation of the subway in the deed from the original grantor of the right of way to the railway company, which deed was lost, or he was entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as of right.

*Clouse v. Canada Southern R. W. Co.*, 4 O. R. 28, 11 A. R. 287, 13 S. C. R. 139, distinguished.

THIS was an action brought by Joseph Wells, as the owner of a certain farm, over which the defendants had, in 1854, purchased a right of way from Joseph Gamble, the then owner.

In his statement of claim the plaintiff alleged that in constructing their railway, the defendants built a subway beneath the same, on the said lands, sufficiently large to admit of the passage of cattle and waggons from one portion to the other for the accommodation of the owner of the farm: that since the construction of the same, and until the time thereafter mentioned, the said subway had remained unobstructed in any way, and had been continuously used by the successive owners of the farm as a means of transferring their cattle and produce from one portion of the farm to the other: that in the month of September, 1886, the defendants, notwithstanding their being remonstrated with and forbidden to do so by the plaintiff, built up the said subway with stone, leaving the plaintiff no means of transferring his cattle from one portion of his farm to the other except over the track of the defendants' railway: and the plaintiff claimed damages for such obstruction, and to have the said subway reopened.



The defendants pleaded "not guilty by statute," referring to the Consolidated Railway Act, 1879, 42 Vic. c. 9, sec. 27, (D.)

The action was tried at Toronto on April 28th and 29th, 1887, before Proudfoot, J.

*Ritchie, Q.C., and R. Boulton, for the plaintiff.*  
*S. H. Blake, Q.C., for the defendants.*

September 5th, 1887. PROUDFOOT, J.—I think the plaintiff entitled to judgment.

In July, 1854, James Gamble sold to the defendants a part of lot 75, in the first concession of the township of King, for the construction of their road.

The road was constructed in 1858, and where the road crossed a depression in the ground a trestle bridge was built, and a subway left under it.

From 1862 till a few months before this action was brought, the plaintiff, and those under whom he claims, enjoyed the undisturbed use of this subway. The defendants are filling, or have filled up this subway in order to make a solid track across the depression in the land, and refuse to make any compensation for it to the plaintiff. The evidence clearly establishes that the subway, owing to the formation of the land, was of great, if not essential, advantage to the owners of the lot.

The plaintiff asks for damages for the obstruction of the subway, and to have it re-opened.

The defendants plead "not guilty," and refer to The Consolidated Railway Act, 1879, sec. 27.

The deed from Gamble to the defendants has been destroyed or lost, and evidence of its contents further than as appears upon the registry is not attainable, or has not been produced. And at the time when it was registered, it was registered in the then usual way by a memorial, which only gives notice that the land mentioned in it was conveyed, but does not, nor was it required in a memorial that it should, mention any condition or reservation

that might have been contained in it. The subway was planked and kept in repair by the workmen employed by the defendants; and the planking extended to some distance on each side of the railway roadbed. A gate was also put up by these workmen, and both planking and gate were renewed ten or more years ago, by the workmen of the defendants. There had been, originally, bars across the subway, but at the request of the landowner the carpenter employed by the defendants substituted a gate for it. The gate was for the benefit of the landowner.

On one occasion it appears that the landowner applied to the "section boss" of the railway to make repairs to the subway, which he did not then do, not because the defendants were not liable to repair, but because he was then much engaged in looking after his section, and he asked the landowner to do it as he had more time.

Since 1862 the subway was in constant use by the land owners, daily, as some of the witnesses say, *i. e.*, for a period of more than twenty years, without objection by the defendants; and in fact they must be taken to have assented to it, by the planking and repairing the subway and making and maintaining gates at the request of the landowners. This, in my opinion, constitutes an enjoyment as of right.

The use was open and continuous. The "section boss" and his men passed daily over the road at this place; they worked at the subway itself, and any officer of the railway travelling over it in the cars could have seen it. The engineer of the defendants knew six years ago that cattle passed through the subway. The engineer says, in his evidence, that it was the duty of the "section boss" with his gang of men to go over this section every day, and for the last twenty-five years they must have done so. If necessary to affect the defendants with knowledge of the subway and its user, I think the evidence sufficiently proves it.

Under these circumstances it seems to me that the plaintiff is entitled to assume that there was a reservation of this subway in the deed from Gamble to the defendants;

or he is entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as of right.

The case of *Clouse v. The Canada Southern R. W. Co.*, 4 O. R. 28, 11 A. R. 287, 13 S. C. R. 139, to which I was referred, is so different in its facts that it does not govern this. There the deed was produced, and contained no reservation, the user was only for about a period of ten years, and the conclusion the Court came to, though not unanimously, was, that the plaintiff intended to rely only upon what the law would give him.

The plaintiff cannot prevent the filling up of the trestle work, but he is entitled to damages for his property in this easement. I understood the defendants' counsel to say that if my decision was against them, he would not object to the damages being ascertained by the Master; but if I am mistaken in this, there will be an order requiring the defendants to have the compensation to be paid ascertained under the Railway Act.

The plaintiff is entitled to costs to the hearing. The subsequent costs, if not disposed of by the arbitrators, are reserved.

A. H. F. L.

---

## [COMMON PLEAS DIVISION.]

IN RE CLARK ET AL. AND THE CORPORATION OF THE  
TOWNSHIP OF HOWARD.

*Municipal corporations—Drainage by-laws—Assessing lands benefited—  
Alteration of assessments—Pro rata variation—Judgment declaring  
prior by-law invalid—Effect of.*

On 21st September, 1868, a by-law was passed by defendants for constructing three several drains in a township, setting forth in separate schedules the lands to be benefited according to the engineer's report, and the amount required therefor to be assessed and levied on the said lands. On 11th December, 1883, the defendants passed a by-law for repairing and cleaning one of said drains, the amount required therefor to be assessed and levied on the said lands assessed for the original construction of said drain. On 21st September, 1886, another by-law was passed to change the assessment for the construction of said drain, and to make it more equitable and prevent injustice in levying same. The engineer was, in making his assessments, limited by the reeve to the lands assessed for the original construction of said drain, and he accordingly limited his assessment thereto, but he reported that great injustice would be done thereby, as a large area of land which would be benefited by the work would escape assessment. The last mentioned by-law declared that the report was adopted, and that in accordance therewith the original assessment should be changed and the assessment as made by the engineer adopted, disregarding his protest as to the large area of land benefited being unassessed. There was an appeal to the Court of Revision against the assessment, and the Court, discriminating in favour of some and against others, altered some of the assessments by deducting amounts therefrom and placing the amounts so deducted on others, leaving others undisturbed, thus not making a *pro rata* variation of all the assessments.

*Held*, that the by-law was bad, and must be quashed.

In 1886 an application was made to the Chancery Division to quash the by-law passed in 1883, which was heard in December, 1886, and judgment delivered in February, 1887, declaring the by-law to be a void proceeding. The by-law in question was passed on 21st September, 1886.

*Quære*, whether this rendered the by-law in question invalid.

ON the 8th October, 1886, an order *nisi* herein was granted calling upon the township to shew cause why by-law No. 13, of 1886, passed by the council of the township of Howard on 21st September, 1886, should not be quashed, &c., on the following, among other grounds: 1. That said by-law was contrary to natural justice, and was not passed in the interest of the public. 11. The engineer who made his report, as in the said by-law is set forth, was improperly limited in his instructions, and prevented from assessing



lands, other than those charged by him, as he should have assessed. 12. The assessment in said by-law was wrongfully and improperly confined to lands charged for the original construction of the said drains. 13. The Court of Revision improperly assessed and charged lands which were not charged by the engineer, without any previous notice to the parties whose lands were to be charged. 20. The council aforesaid, at said Court of Revision, varied the assessment made by their engineer, as published in said by-law, without varying the other assessments *pro rata* as required by law, but on the contrary, reduced some of the assessments by a specific sum, and placed such specific sum against other lands, and increased particular assessments by particular sums, taking such respective sums from other assessments.

The facts are sufficiently referred to in the judgment.

On the 11th April, 1887, *Wilson* (of Chatham), supported the order *nisi*.

*Pegley*, contra.

June 25, 1887. ROBERTSON, J.—On the 21st September, 1868, the municipal council, on a petition from a majority of the resident owners of lands on and adjoining certain creeks called “McCargan’s,” “McGregor’s,” and “Bile’s,” and “Crawford’s,” running through the township of Howard, and by authority of 29 & 30 Vic. ch. 51, secs. 281 and 282, passed a by-law to raise by way of loan \$6,878, for the purpose of constructing certain drains in different parts of the township, and for other purposes. The lands to be benefited by the proposed drains were mentioned and set forth in three separate schedules attached to the by-law, a schedule for each drain. The several localities had been previously examined, as was required by the statute, by surveyors, who had prepared plans and estimates, and had furnished the same to the council, showing how much the drains would cost, and how much of the land required should be contributed by each section to be

benefited, including the sum of \$272.50 to be paid by the adjoining township of Harwich, into which one of the drains had to be extended. After these preliminary statements, made in the by-law, it declared that it is requisite and necessary that a portion of the means for payment of the construction, shall be raised by debentures, to be issued by the township, payable within a period of nine years, from 1st January, 1869 : that the locations described shall be drained according to the plans and specifications aforesaid ; and that there " shall be raised, levied, and collected from and off the several lots, or parcels of lots, of land within the municipality, as set forth in schedules Nos. 1 and 2 of the by-law, \$5,628.59, in ten equal annual amounts of \$562.85 each ; " to be collected as the ordinary taxes are collected on real property, and with the other municipal taxes, each year until paid with interest, &c.

Afterwards, on the 11th December, 1883, the same municipality passed another by-law, No. 16 of 1883, to provide for the repairing and cleaning out one of the above mentioned drains, known as the " McGregor Creek drain," and for borrowing on the credit of the municipality \$2,000, for completing the same, which by-law contained recitals as to the passing of the other by-law, the necessity for cleaning out and repairing, &c., and that the council had caused an examination of the " McGregor Creek drain " to be made by an engineer and provincial land surveyor, who had reported the amount of the necessary expenditure therefor, upon the original assessment, and that \$2,000 was required, &c.; and that it was proposed to raise that sum by the issue of debentures.

Afterwards, on 21st September, 1886, the council passed the by-law now in question, which is declared to be, " To change the assessment made for the construction of the McGregor Creek drain," &c.; and, after reciting the passing of the two hereinbefore mentioned by-laws, declares that " in the opinion of the said council it has become necessary to change the said assessment for the purpose of making it more equitable, and to prevent injustice in levying said

assessment; and, for this purpose, the council of the said municipality have caused an examination to be made by Augustine McDonell, Esq., a duly qualified engineer and provincial land surveyor, of the works and repairs on said McGregor Creek drain; and the said Augustine McDonell, having examined said work and repairs, made his report to the said council in the words and figures following, that is to say: 'In accordance with your instructions, received from the reeve, &c., requesting me to make an examination of certain lands in your township for the purpose of levying an assessment to defray the expenses of repairing the McGregor Creek drain, in the township of Howard, I beg to say, &c. \* \* I find, in the first place, that certain lands, such as the south-west part of lot 17, parts of 15 and 16, on the town line range were assessed for the original construction of the McGregor Creek drain, but cannot be assessed for the recent improvements, inasmuch as the said lands drain into the creek below where any improvement was made; consequently we cannot assess them for the recent improvements on the McGregor Creek drain. As I am limited by instructions to confine the assessment to the lands originally assessed for the construction of the McGregor Creek drain, being lots 17 and 18, and the south parts of lots 3 to 13 inclusive, in 5th concession of Howard, and north halves of lots 4 to 13 inclusive, in 6th concession, excepting the north half of lot 8, the amount required to be assessed, which is \$2,000, will come very heavily on the above described territory. Again, I find that several other drains, such as the Crouch drain, the Harrison drain, and the Crawford drain, have been constructed since the McGregor Creek drain, and using the said McGregor Creek drain as an outlet, draining some 9,000 acres of land into the McGregor Creek drain, and not paying a cent for the use of the outlet, which is a grievous wrong to the people who paid for the construction and maintenance of the McGregor Creek drain, inasmuch as the above mentioned 9,000 acres should be taxed in the fair proportion of the cost of the recent improvements on the McGregor Creek drain, as well

as with a fair proportion of the original cost of the construction of said drain.’”

The by-law goes on then to declare: “1. That the report of Augustine McDonell, above set forth, be, and the same is hereby adopted;” 2. That the “original assessment for the McGregor Creek drain, as set forth in the schedule attached to said by-law for the construction thereof, and in the by-law passed for the repairs thereof above mentioned, be and the same is hereby changed in accordance with the said reports, and that the assessment made by the said Augustine McDonell, and contained in the schedule attached to his said reports, a copy of which is above set forth, be, and the same is hereby declared to be the assessment for the repairs of the said drain against the lots and parts of lots and roads benefited by the construction of said drain and the repairs thereof, and shall be substituted for and take the place of the said original assessment, subject only to the like right of appeal as the persons charged would have in the case of an original assessment.”

Then there is a clause that the by-law shall be published, &c., as required by law. “4. That this by-law shall take effect immediately after the final passing thereof; but shall be applicable only to the remaining two yearly payments hereafter remaining due, and not to any yearly payments already made under the original assessment or assessment for repairs.”

Here it should be stated that Mr. McDonell annexed to his report a schedule of the lands, which he was instructed by the reeve to confine himself to, in making the assessment for repairs, which are the same lands as were assessed for the original construction; and as the 570th section of the Municipal Institutions Act, 1883, required he should do, he also made an assessment of the real property to be benefited (according to his limited instructions), stating, as nearly as may be, the proportion of benefit to be derived therefrom (*i.e.*, the contemplated work) by every lot or portion of lot, &c., by placing sums of money opposite such parcels, indicating thereby the proportion of benefit, *e.g.*:—



Con. 6, N $\frac{1}{2}$ lot 7, 99 acres .....	\$104 00
“ N. W $\frac{1}{4}$ lot 9, 50 acres .....	60 00
“ N $\frac{1}{2}$ lot 10, 100 acres .....	120 00

and so on, particularizing and assessing each lot or parcel, which was assessed, &c., under the by-law of 1868.

The object of this examination, assessment and report is intimated by the sub-sec. 3 of sec. 570, which is to enable the council to levy a special rate upon the real property to be benefited by the work, sufficient for the payment of the principal and interest of the debentures, “in proportion as nearly as may be to the benefit derived by each lot or portion of lot and road in the locality.” And it is evident from sub-sec. 6, that the engineer and surveyor is the party or officer, who is to make the assessment, &c., subject to the right of appeal to the Court of Revision and County Judge, as provided in ordinary cases, under “The Assessment Act,” (sub-secs. 9 to 14 inclusive.)

Then sub-sec 15 provides: “In case, on any such complaint or appeal, the assessment is varied in respect of the property which is the subject of the complaint or appeal, the Court or Judge, as the case may be, shall vary *pro rata* the assessment of the said property, and of the other lands and roads benefited as aforesaid, &c., \* \* \* so that the aggregate amount assessed shall be the same as if there had been no appeal.”

This by-law shews, however, that this was not fairly and justly carried out; and, for example, take the before mentioned several parcels :

Con. 6, N. $\frac{1}{2}$ lot 7, 99 acres, \$104 assess. by P. L. S., reduced to	\$50.25
“ N.W. $\frac{1}{4}$ “ 9, 50 “ 60 “ “ “	50.25
“ N. $\frac{1}{2}$ “ 10, 100 “ 120 “ “ “	75.36

and by way of further illustration take the following parcels :

Con. 5, N. pt. lot 3, 108 acres, \$30 assess. by P. L. S. increased to	\$85.42
“ “ S. pt. “ 3, 32 “ 12 “ “ “	12.06
“ “ S. $\frac{1}{2}$ “ 4, 100 “ 74 “ “ “	120.60
“ “ S. $\frac{1}{2}$ “ 5, 90 “ 82 “ “ “	115.05
“ “ S. $\frac{1}{2}$ “ 6, 100 “ 74 “ “ “	120.11
“ 6, N. $\frac{1}{2}$ “ 4, 100 “ 45 “ “ “	45.22
“ “ W. $\frac{1}{4}$ “ 5, 50 “ 30 “ “ “	30.15

all of which goes to show that the council, contrary to the allegation in the second clause of the by-law, that the assessment "is hereby changed in accordance with the said report, and the assessment made by the said Augustine McDonnell and contained in the schedule attached to his said report, be, and the same is, hereby declared to be the assessment for the repairs of the said drain against the lots and parts of lots, &c., benefited by the construction of the said drain and the repairs thereof," &c.,—has thrown aside the assessment made by the engineer, and most unfairly discriminated in favor of some and against others, so that it cannot be said that the *pro rata* rule laid down by the statute has been observed.

On examination of the schedule it will be seen that these discriminations have been made in groups, showing that one section of the township is being highly favoured at the expense of another section, indicating, as it is suggested, that the favoured ones have influences which the others have not been able to counteract. Take for example lots 6 to 13 inclusive, in the 6th concession, which, according to the assessment of the engineer, are benefited in the aggregate to the extent of \$755. The Court of Revision, however, have reduced the same assessment in the aggregate down to \$390.68. Then take lots 3 to 9 inclusive, in 5th concession, the aggregate assessment by the engineer is \$621, which has been increased to \$864.22, while, as above pointed out, there are numerous instances where the alteration either way is insignificant.

In my judgment this is not what was intended by the Legislature, nor can it be said to be the meaning of the statute. In the first place, the appointment of a provincial land surveyor or engineer, as required by the Act, is a necessary step to be taken preliminary to the consideration of the question of granting the prayer of the petitioners, the object being to ascertain what the cost will be, and to charge each parcel or lot of land benefited according to the benefit to be received by the construction of the work. The Legislature, therefore, declared that an engineer or

provincial land surveyor should be the person employed to do this work, for the simple reason that, from the nature of his profession and his education, he is the description of professional man who could make the proper calculation and arrive at the most just and accurate conclusion. It is true his decision is to be subject to an appeal, and, in case of the Court or Judge being satisfied that the engineer has made an error, rectification takes place.

If the amount in one case is to be reduced and another increased, then a *pro rata* variation is to take place along the whole line, so as to make the aggregates the same as that found by the engineer. This is what is complained of in this by-law. It is said that the Court of Revision has not acted according to law; in fact, that they have unjustly lessened some, while they have unjustly increased others, leaving others again undisturbed.

It is claimed, moreover, that this by-law is unjust, and should be quashed on other grounds, because it purports to amend or correct the by-law which was passed in 1883, which has been the subject of controversy in the Chancery Division of this Court, and which has been declared to be a "void proceeding" in that action (*ante* p. 22).

In the year 1886, Robert Alexander, James Alexander, and Alexander Clark—(Robert Alexander and Alexander Clark being two of the complainants in this matter)—brought an action in the Chancery Division to restrain this corporation from levying the taxes declared to be payable under the by-law passed in December, 1883. And in that action it was adjudged that this by-law was "a void proceeding." And Ferguson, J., who tried the case, in his judgment says in reference to it. "The report of Mr. McDonell and his evidence given at the trial, (which was no doubt correct) shews the great injustice of this by-law" (*i. e.* the by-law of 1883.) "I think it extremely unjust, and fears may, I think, be reasonably entertained that influences were brought to bear to procure the passing of it that were not of an entirely pure character."

This judgment, however, was not delivered until the month of February, 1887 ; and, in the meantime, and before the trial, which took place on 7th December, 1886, the council, on 21st September, had passed the by-law now in question. And it is urged with some force that this by-law, being based upon a by-law which has been declared "a void proceeding," must fall by reason of the foundation on which it was constructed having been destroyed.

I do not think it necessary to determine whether the objection taken in that respect is good or not ; but I have come to the conclusion, that the remarks of my learned brother, applicable, as they doubtless were, to the by-law which he had under consideration, are of equal force and quite pertinent to the by-law now before me.

It will be observed that the report of Mr. McDonell is set out *in extenso* in this by-law—that the report is adopted. It is thereby on the face of the by-law declared that the statements therein made are reliable and trustworthy, so far as the members of the council or their knowledge is concerned, in that report.

Mr. McDonell says : " As I am limited by instructions to confine the assessment to the lands originally assessed for the construction of the McGregor Creek drain, being lots 17 and 18 and the south parts of 3 to 13 inclusive, in the 5th concession of Howard, and the north halves of lots 4 to 13 inclusive, in the 6th concession, excepting the north half of lot 8, the amount required to be raised, which is \$2,000, will come very heavy on the above described territory."

Mr. McDonell also points out other "grievous wrongs to the people who paid for the construction and maintenance of the McGregor Creek drain, inasmuch as the above mentioned 9,000 acres should be taxed in the fair proportion of the cost of the recent improvements on the drain as well as a fair proportion of the cost of the original construction."

Now, in the first place, it was a gross and unwarrantable interference on the part of the reeve, or any other member of the council, to limit the engineer as to the lands he was to assess. The statute, sec. 570, expressly declares what



his duties are, viz., "to make an examination of the \* \* locality proposed to be drained \* \* and an assessment \* \* of the real property to be benefited by such work, stating as nearly as may be, in the opinion of such engineer or surveyor, the proportion of benefit to be derived therefrom by every read and lot, or portion of lot," &c.; and he should not have been interfered with. He was acting in a quasi judicial capacity; and feeling that, as he evidently did, he protests against it in his report; and points out in strong terms the "grievous wrong" that has been already inflicted on some of the parties, and which will be magnified by carrying out the "limited instructions" under which he has been obliged to act. But, notwithstanding this protest, the council proceed, and they leave unassessed at least 9,000 acres of land which the engineer has reported to them as benefited by the work; and declare that the lands, which were originally made to bear and were charged with the original construction, shall be the only lands which shall now be charged with the payment of this further sum of \$2,000, required for the repairs; and that the 9,000 acres shall go free. When it is also considered that this by-law professes to make the assessment "more equitable, and to prevent injustice in levying said assessment," it is difficult to find language properly expressive of the real character of this municipal legislation.

The 584th section of "The Consolidated Municipal Act, 1883," expressly declares that "After such work" (*i.e.* the drain) "is fully made and completed, it shall be the duty of each municipality \* \* to preserve, maintain, and keep in repair the same," either at its own expense, or "at the expense of the parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council upon the report of the engineer or surveyor may seem just." Here we find the council, however, flying into the very teeth of this provision and in direct opposition to what the surveyor has declared to be just.

The affidavits and papers filed disclose a state of things which, in my judgment, reflect great discredit on the members of this council who were privy to the passing of this by-law; and I think it is a misfortune that there is not some means by which the consequences of this questionable conduct can not be more directly brought home to them instead of on the ratepayers generally; but of course as to this the ratepayers have the matter in their own hands, so far as any honor may be attached to the office of municipal councillor.

For the reasons given I think the by-law should be quashed, with costs.

---

[COMMON PLEAS DIVISION.]

CLAYTON ET AL. V. McCONNELL.

*Building contract—Termination of before completion of work—Evidence of  
—Right to recover amount due.*

The plaintiffs were employed by defendant to do the masonry work on a building. During the course of the work defendant refused to pay the full amount then due according to the terms of the contract, and caused plaintiffs delay in not having the joists ready at the proper time for plaintiffs' use; and, when asked for more money, told plaintiffs to go on with their work, or, if they would not go on, to leave the building. The plaintiffs thereupon left the work.

*Held*, that the defendant having left it optional with the plaintiffs to proceed or abandon the work, and they having elected to abandon it, were justified in considering the contract at an end, and were entitled to recover the amount then due them.

THIS was a mechanics' lien case, and was tried at the Toronto Spring Assizes of 1887, when the lien was declared in favor of the plaintiffs, with a reference to John Winchester, Esq., to take the accounts, and to determine the other questions in the case.

On 24th July, 1886, by agreement entered into between the plaintiffs and defendant, the plaintiffs agreed to do the

masonry, &c., for the defendant, necessary in the construction of a building, &c. The plaintiffs were to lay not less than 10,000 bricks each day until the job was completed, or as many more thousand per day as possible, &c. The plaintiffs were to be paid \$4.00 a thousand. Payment to be made at the end of every two weeks, less one-eighth, which was to be paid at the close of the job.

Mr. Winchester made his report, which, after setting out his entering on the reference, &c., was as follows:—

2. "That the plaintiffs, in pursuance of the agreement in the pleadings mentioned, worked for the defendant in the erection of the buildings, therein also mentioned, up to the 21st day of August last, for which the defendant became indebted to them in the sum of \$176 for stone work, and \$455.59 for brick work, making together the sum of \$631.59, of which the sum of \$68.95, being one-eighth, was to be retained until the close of the job, leaving the sum of \$552.64 payable up to the said date.

3. The defendant paid the said plaintiffs the sum of \$508 on account of said work prior to said 21st day of August, and supplied them with goods to the value of \$26.37 out of his store, and these goods, by previous agreement between the parties, were to be received by the plaintiffs as payment on account of the contract, which two sums make together the sum of \$534.37.

4. Deducting this latter sum of \$534.37 from the above-mentioned sum of \$552.64, there was left a balance of \$18.27 due by the defendant to the plaintiffs on the said last-mentioned date. The defendant, on the 23rd August last, paid the plaintiffs a further sum of \$16.46, leaving \$1.81 due by said defendant to the plaintiffs, to which the percentage of \$68.95 being added makes a balance of \$70.76, now due by the defendant to the plaintiffs.

5. I find that the plaintiffs left the said work before completing the same, and were justified in so doing for the following reasons, namely; the defendant refused to pay them the full amount due, according to the terms of the contract, and caused the plaintiffs' delay in not having the joists ready at the proper time for their use, and when asked for more money he finally told them to go on with their work, or, if they would not go on, to leave the building.

6. I find specially, at the request of the defendant's solicitor, that the counter-claim of said defendant was not enquired into by me, it not being necessary to do so in view of my findings as set forth in the fourth paragraph hereof. And it further being agreed between the parties hereto that in case such findings were reversed, the said counter-claim should then be proceeded with.

7. I further find specially, at the defendant's request, that the defendant believed that he had, on the 21st day of August last, paid the plaintiffs as much as they were entitled to receive under the contract, being deceived in the manner in which he himself measured the stone-work under the contract; but I find that the plaintiffs were in no way to blame for this.

8. I further find specially, at the defendant's request, that when the plaintiffs left the said work they had laid only 113,898 bricks, instead of 135,000, as claimed by them.

9. I further find specially, at the defendant's request, that the defendant did all in his power to get the joists laid, so that the plaintiffs would not be delayed in their work, and kept the carpenters working over-time and at night, in order to accomplish this, but in consequence of the joists not being laid in time, he delayed the plaintiffs in their work, to their loss."

From this report the defendant appealed, the argument turning upon the finding as found by Mr. Winchester with reference to the dismissal of the plaintiffs, and their right to abandon the work under the circumstances found by the referee.

*Lash*, Q. C., in support of the appeal.

*Roaf*, contra.

June 25, 1887. GALT, J.—The appeal herein is against the fourth and fifth findings.

The fourth has reference to the question of amount now due to the plaintiffs, and need not, in the view which I take of the fifth, be considered.

The fifth finding is as follows:



5. "I find that the plaintiffs left the said work before completing the same, and were justified in so doing for the following reasons, namely, the defendant refused to pay them the full amount due according to the terms of the contract, and caused the plaintiffs' delay in not having the joists ready at the proper time for their use, and when asked for more money he finally told them to go on with their work, or, if they would not go on, to leave the building."

The learned Referee, in his judgment, held that this justified the plaintiffs in considering the contract at an end, and entitled them to receive any balance that might be due to them.

Mr. Lash contended that this was an erroneous finding; and, therefore, the defendant was entitled to counter-claim against the plaintiffs. He relied on the case of *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648, and same case in 9 App. Cas. 434, to shew that the mere refusal to pay the amount claimed by the plaintiffs was not such an act as would justify the plaintiffs in refusing to proceed with their contract. In this contention he is undoubtedly sustained by the authority of that case; but the learned Referee's judgment is not based on that alone, but on the fact that the defendant, when the plaintiffs "asked for more money he finally told them to go on with their work, or, if they would not go on, to leave the building," thus leaving it optional with them whether they would proceed with the work or abandon it.

In the *Mersey Case*, when it was before the Divisional Court, the Master of the Rolls refers with approval to the rule stated in *Freeth v. Burr*, L. R. 9 C. P. 208.

Lord Coleridge in that case laid down the following propositions, which are referred to, at p. 213: "I mention that because it is important to express my view that, in cases of this sort, where the question is, whether the one party is not free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to aban-

don and altogether to enforce performance of the contract. I say this in order to explain the ground upon which I think the decision in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

Now, in the present case it is true the defendant did not in express terms forbid the plaintiffs proceeding with the work, but he did, by the expression used by him, leave it optional with the plaintiffs to proceed with or abandon the work. They accepted the option; and therefore I am of opinion the learned Referee was right when he found the plaintiffs were justified in considering the contract at an end.

This appeal must be dismissed, with costs.

---

## [COMMON PLEAS DIVISION.]

## REGINA V. COLLINS.

## REGINA V. GOULAIS.

*Canada Temperance Act 1878—Defendant summoned to appear before one justice—Charge laid before two justices—Appearing on summons—Waiver—Necessity to state absence, &c., in conviction of justices before whom charge laid—Week—Computation of time.*

The summons for an offence under the Canada Temperance Act 1878, stated that the defendant was charged with offence before one justice. The information was laid before two justices, one of whom issued the summons. The defendant appeared on the summons, when two justices were present, and cross-examined the witnesses for the Crown, and called witnesses on his own behalf.

*Held*, that the fact of so issuing the summons was a mere irregularity, which was waived by appearing on the summons.

*Held*, also, that the justices before whom the case was to be tried need not be named on the summons.

*Held*, also, an objection that the conviction did not shew upon its face the absence of either of the justices before whom the information was laid, nor the assent of the other that another justice should act or take part in the prosecution was one of form merely, against which secs. 117, 118 sufficiently provided; and, even without the aid of such sections, it was doubtful whether the objection could prevail.

Sec. 46 provides that the hearing may be adjourned to a certain time and place, but no such adjournment shall be for more than a week.

*Held*, that the week must be computed as seven days exclusive of the day of adjournment.

IN the case against COLLINS, *Masten*, on 3rd May, 1887, obtained an order *nisi* to quash the conviction on the following grounds:

1. That the justices of the peace before whom the information herein was laid were not named in the summons upon which the conviction was founded.

2. That the justices of the peace before whom the case was to be tried were not named in the summons upon which the conviction was founded.

3. That the defendant was summoned to appear before the summoning, or before such other justice or justices of the peace as might be present at the time and place appointed for trial.

4. That the conviction does not shew upon its face the absence of either of the magistrates before whom the infor-

mation was laid, nor the assent of the other of them that another justice should sit or take part in the prosecution.

5. That the conviction does not disclose that the offence was committed in the county of Victoria.

6. That the information was not laid before two justices of the peace for the county of Victoria.

7. That the hearing of the case was adjourned for more than one week without the consent of the above named Collins.

8. That the hearing of the case was adjourned for the purpose only of obtaining the attendance of certain witnesses who were subpoenaed for the first hearing, and upon the renewed hearing other witnesses were examined.

The information was laid on the 13th October, 1886, and sworn before two justices of the peace, and was as follows :

"The information and complaint of John Short, of the town of Lindsay, inspector, taken this 13th day of October, 1886, before the undersigned two of Her Majesty's justices of the peace in and for the county of Victoria, who said that Thomas Collins, hotelkeeper, Bobcaygeon, did, between the 13th September and 6th October, at his hotel in the said village of Bobcaygeon, in the county of Victoria, sell intoxicating liquor contrary to the provisions of the Canada Temperance Act of 1878, said Act being then in force in said county of Victoria."

(Sd.) "JOHN SHORT."

"Sworn before us the day and } (Sd.) "WM. THURSTON, J.P.  
year first above mentioned." } (Sd.) A. O'LEARY, J.P."

The summons was issued on the same day, and was :

"Whereas you have this day been charged before the undersigned, one of Her Majesty's justices of the peace in and for the said county of Victoria, for that you," &c., setting out the charge. "These are therefore to command you in Her Majesty's name to be and appear before me on Monday, the 18th October, 1886, at eight o'clock in the afternoon, at the town hall, Bobcaygeon, or before such other justice or justices of the peace for the same county as may be there, to answer the said charge, and be further dealt with according to law."



The summons was under the hand and seal of Wm. Thurston, one of the above named justices.

The case was heard before the said Wm. Thurston, and George Beck, another justice of the peace.

The defendant appeared at the hearing, and the charge was entered into. The defendant called and examined witnesses on his own behalf and cross-examined the witnesses for the prosecution.

An adjournment took place until another day, when the Court sat until 6 p.m., when there was a further adjournment for a week. On the day to which the last adjournment was made the Court did not sit until 6.30 p.m.

The conviction was dated 1st November, 1886, and was that the said defendant between the 30th September and the 5th October, 1886, did unlawfully sell intoxicating liquor contrary to the provisions of the Canada Temperance Act of 1878, then in force in the county of Victoria, and having been in force since the 5th May, 1886, in said county of Victoria; and it was adjudged the said defendant for his said offence should forfeit and pay the sum of \$50, and \$5.55 for costs.

In the case against GOULAIS the information was laid on the same day as in the case against Collins, namely, the 13th October, 1885, and charged the defendant "for that she did between the 6th day of July and the 6th day of October, A.D. 1886, sell," &c.

The summons, the statements of witnesses, and the conviction all followed the same formula, charging the defendant with the sale of liquor between the 6th of July and the 6th of October.

The fifth ground of objection in the order *nisi* was, that by the conviction it did not appear that the prosecution was commenced within three months after the alleged offence was committed, and that the evidence in support of the conviction did not disclose that the alleged offence was committed within three months prior to the commencement of the prosecution.

On June 7, 1887, both cases were argued.

*Masten*, supported the orders.

*Aylesworth*, contra.

June 9, 1887. O'CONNOR, J.—The conviction in the first named case is objected to on eight several grounds.

I think the first ground of objection is immaterial. The object of the summons is to bring the accused before the justice or justices, in order that the case may be adjudicated on in the presence of the accused. Had he not appeared in this case, it is probable that the case could not be proceeded with in his absence, for the summons merely informed him that he was before one justice only, whereas section 105 of the Canada Temperance Act, 1878, requires that he should be charged before two justices of the peace. He might therefore have treated the summons as nullity.

But I think his appearing on the summons waived the objection to the summons *per se*, as it was a mere irregularity. But if the information charging him was in fact taken by only one justice, the accused might have objected to the whole proceeding as void; and, if the case proceeded to conviction, the conviction might be quashed on that ground.

But when the accused appeared on the summons, and the fact was that the information was taken by two justices, one of whom issued the summons, the case might properly be proceeded with to conviction.

The second objection might judiciously have been omitted. The summons was in the form provided by the Dominion Act 32 & 33 Vic. ch. 31, which, by section 107 of the Temperance Act, is incorporated therein, so far as procedure is concerned, and so far as no provision is made by the Temperance Act in respect of procedure; and in this respect the Temperance Act makes no such provision. Besides it is inconsistent with section 105, that the justices before whom the case was to be tried should be named, because it provides, by implication, that in the

absence of the justices before whom the prosecution is brought, other justices may sit or take part therein.

The third objection is sufficiently answered by the answer to the second.

The fourth objection is one of form against which sections 117 and 118 sufficiently provide; and, even if there were no such provisions in the Act, I doubt that the objections could prevail.

The fifth objection is founded on a mistake of fact: and so also is the sixth objection.

The seventh objection is also unfounded. Section 46 of the Act 32 & 33 Vic. ch. 31, (D.), provides that the hearing may be adjourned "to a certain time and place," &c., "but no such adjournment shall be for more than one week." A week is a period of seven days; and I think the case of *Williams v. Burgess*, 12 A. & E. 635, is authority for holding that the seven days should be computed from and exclusive of the day of the act or occurrence—that is, of the adjournment: *Wharton's Lexicon*, (6th ed.), p. 267, the word "day."

An adjournment for a week would then be an adjournment for seven days after the day on which the adjournment occurred, and that would give the whole of the last of the seven days, that is, up to midnight.

The objection, is that the adjournment took place at six o'clock p. m. on the day of the adjournment, and was to continue to half-past six p. m. on the last of the seven days, when the Court was to resume its sittings for the hearing of the case.

As to computing weeks, see *Re Coe and Corporation of Pickering*, 24 U. C. R. 439; *McCrea v. Waterloo County Mutual Fire Ins. Co.*, 26 C. P. 431; *Wilson v. Black*, 6 P. R. 130; *Hanns v. Johnston*, 3 O. R. 100.

The eighth objection is, in my opinion, quite immaterial.

The order *nisi* to quash the conviction must be discharged, with costs.

In the case against GOULAIS the conviction was moved against on the same grounds. It appears to have been tried at the same time as the case against Collins, took the same course, and was subject to the same and only the same objections, except one which I did not consider important, viz., the fifth.

The order *nisi* will therefore be discharged in this case also, with costs.

*Orders nisi discharged.*

---

[CHANCERY DIVISION.]

RE CLARKE AND THE UNION FIRE INSURANCE  
COMPANY, (2).

*Dominion Winding-up Act—Constitutionality—B. N. A. Act, sec. 91, art. 21—Provincial company—Application of Act.*

*Held*, that the Winding-up Act, 45 Vic. ch. 23, (D.) is *intra vires* the Dominion Parliament, and is in the nature of an insolvency law, and applies to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company in question in this case, though incorporated under a Provincial charter, was subject to its provisions.

*Re Eldorado Union Store Co.* 6 Russ. v. Geld, 514, followed; *Merchants Bank of Halifax v. Gillespie*, 10 S. C. R. 312, distinguished.

THIS was an application on behalf of the petitioners, who had obtained a winding-up order against the Union Fire Insurance Company (see 10 O. R. 489, 13 A. R. 268,) for the appointment as liquidator of one R. Jenkins.

The winding-up order, previously made, was set aside by the Supreme Court of Canada on an appeal from the judgment of the Court of Appeal (13 A. R. 268) on the ground that by the 43 Vic. ch. 23, sec. 24, (D.) as amended by 47 Vic. ch. 39, sec. 4 (D.) it was made imperative upon the Court or Judge making the winding-up order, and in the order, to appoint a liquidator, and that the Court or Judge could not direct a reference to the Master to make the



appointment. The Supreme Court accordingly (whose judgments are not yet reported) referred back the petition to the Court of first instance to make the proper order upon it.

The petition was accordingly now again brought on for hearing, and the petitioners asked, amongst other things, that the usual winding-up order be made, and a liquidator appointed.

The application was heard on September 27th, 1887, before Boyd, C.

*W. Cassels*, Q. C., for Shoolbred, a creditor of the company. I attack the winding-up order as not warranted and the statute 45 Vic. ch. 23 (D.) as *ultra vires*. The company was incorporated by the Ontario Legislature, and it is now sought to be put into liquidation under a Dominion Act which does not apply to local companies: *Merchants Bank of Halifax v. Gillespie*, 10 S. C. R. 312. The Winding-up Act of the Dominion is not an insolvency Act.

*Bain*, Q. C., for the petitioners. The Act is purely an insolvency Act, and it is different from either the English or the Ontario Act. It can only be put in operation at the instance of a creditor, while the provisions of the Ontario Winding-up Act are only available to the company or a shareholder. We ask that the company be declared insolvent, and held liable to be wound up under the Dominion Act. See *Shields v. Peak*, 8 S. C. R. 579; *Citizens Ins Co. v. Parsons*, 7 App. Cas. 96. This question was argued before the Supreme Court upon the appeal from the former winding-up order. Although the judgments delivered in the Supreme Court do not proceed upon this point, the Court must have considered and arrived at the conclusion that the Act applied to companies formed under local Acts, otherwise the petition would have been dismissed, instead of being referred back to this Court to deal with.

September 29th, 1887. BOYD, C.—This Act is in the nature of an insolvency law affecting various trading and other corporations carrying on business in Canada. It is not of a private or local character, but affects all corporate bodies within its scope all over the Dominion. It embraces companies that are insolvent, and being for that reason unable to prosecute business, it provides for terminating their existence, and realizing and distributing their assets in a just and equitable manner as under the English Wind-up Acts. I have no doubt that the Act is within the competence of the Dominion Parliament under the British North America Act, sec. 91, art. 21, and that the present company, incorporated under a Provincial charter, is subject to its provisions. This conclusion has been indeed already reached by my brother Proudfoot in this same matter: *Re Clarke and The Union Fire Ins. Co.*, 10 O. R. 489, and I do not understand that his order has been interfered with on this ground by the Supreme Court. The like view of the law has been taken in Nova Scotia in *Re Eldorado Union Store Co.*, 6 Russ. & Geld 474. The case in the Supreme Court of *The Merchants Bank of Halifax v. Gillespie*, 10 S. C. R. 312, does not touch the status of the present company, which is a domestic corporation within the territorial limits of Canada; whereas the company there in question was, for the purposes of the Act, a foreign one domiciled in England.

The company is to be declared insolvent, and subject to be wound up under the provisions of the statute. A direction may also be given to tax and pay those costs ordered to be paid by the Court in *Clarke v. Union Fire Ins. Co.* The order will not, however, be drawn up till the name of the liquidator is agreed upon or determined, unless, indeed, it be referred to the Master for this purpose.

A. H. F. L.

NOTE.—A notice of appeal to the Court of Appeal in this cause has been served upon the petitioners.—REP.

## [QUEEN'S BENCH DIVISION.]

## WHITEHEAD V. WHITEHEAD.

*Voluntary conveyance—Husband and wife—Declaration of trust.*

A husband, on 2nd September, 1885, by deed of B. & S. made in pursuance of the Act respecting short forms of conveyances, conveyed to his wife certain lands, the consideration being "natural love and affection and \$5," the receipt of the consideration being also admitted in the deed, besides the usual marginal receipt of the \$5; habendum to the wife, her heirs and assigns for her and their sole and only use forever.

*Held*, that the evident intention of the owner might be given effect to, as far at least as the beneficial interest in the property was concerned, and an order was, therefore, made, vesting in the wife all the estate and interest of the husband at the date of this deed to her.

THIS action was brought by the grantee in a certain deed, the widow of the grantor, against the defendants as his heirs, seeking to have a vesting order vesting in the plaintiff all the title Samuel Whitehead, the grantor, had at the date of the deed made by him to his wife.

The defence was that the deed was voluntary, and therefore the plaintiff was not entitled to relief.

It appeared that on the 2nd September, 1885, Samuel Whitehead conveyed to his wife, the plaintiff, certain parcels of land, by a deed of bargain and sale made in pursuance of the Act respecting short forms of conveyances. Samuel Whitehead was the party of the first part, and the plaintiff, his wife, the party of the second part, and they were the only parties to the deed.

The consideration named in it was "natural love and affection, and five dollars." The receipt of the consideration was admitted in the deed, and besides there was an independent receipt of the \$5 in the margin. The *habendum* was to the plaintiff, her heirs and assigns, for her and their sole and only use forever; and there were the usual covenants for title.

Samuel Whitehead, on the 11th October, 1885, died intestate, leaving three children, infants, the defendants in this action.

*Morton*, for the plaintiff.

*Ellis*, contra.

October 5, 1887,. PROUDFOOT, J.—The conveyance from husband to wife was ineffectual at the time it was made to pass the legal estate, though it is otherwise now (49 Vic. c. 20, sec. 6, (O.))

The plaintiff admits that the deed was entirely voluntary.

At law a deed from husband to wife was wholly inoperative, but it was otherwise in equity, and it might suffice to pass all his equitable interest and give an equitable title that could be made use of to have the legal estate conveyed.

Upon what principle this went has been the matter of much discussion and of many variant decisions. If the instrument were defective and voluntary the Court would not interfere; but if the donor had executed the necessary papers and done all he could to make them effectual the Court would aid them, though voluntary.

The question was much discussed in *Tiffany v. Clarke*, 6 Gr. 474, where the holder of a mortgage purported by an indorsement on it to assign it to his wife, but the indorsement was not sealed. It was a voluntary act. The Court held the instrument defective for want of a seal, and therefore that the Court would not aid it. Had the assignment been under seal no doubt the decision would have been the other way. The Court considered that an imperfect instrument intended to take effect as a direct transfer, could not, under the authorities as they then stood, be construed as a declaration of trust, though the distinction was thin.

Since that time the Courts have sometimes struggled to give effect to the evident intention of the parties, though in other cases the old rule has been more rigidly followed. In *Baddeley v. Baddeley*, 9 Ch. D. 113, a husband, by a deed poll, recited as follows, "Whereas I am beneficially possessed of the ground rents hereby intended to be settled," and continued, "I do hereby settle, assign, transfer, and



set over unto my wife, as though she were a single woman," several leasehold houses, and the ground rents. The deed was voluntary, but it was held it was not void as being an intended assignment, but operated as a declaration of trust. Malins, V.C., said: "No doubt a voluntary gift by way of assignment is invalid, unless it is perfected by a transfer; the voluntary settlor must do all that he can do to transfer the property, and a husband cannot transfer to his wife. But this is, in my opinion, a case where the husband has declared himself a trustee for his wife, and she entered into possession. \* \* The husband was no doubt mistaken in thinking he could make this gift by way of assignment, but there is enough in the deed to make it operate as a declaration of trust, which the Court ought to carry into effect."

There was nothing in the deed poll to mark a declaration of trust save the ineffectual attempt to transfer.

And in *Fox v. Hawks*, 13 Ch. D. 822, a husband executed an assignment by deed to his wife of a leasehold dwelling house, "to hold the same unto 'the wife,' her executors, administrators and assigns, as her separate estate." It was held that the deed of assignment operated as a valid declaration of trust in favor of the wife. Bacon, V.C., approves of *Baddeley v. Baddeley*, and says that, "according to the doctrine now well established in this Court, a husband may, under such circumstances, become a trustee for his wife, but cannot retain any beneficial interest in the thing which is the subject of the deed."

On the other hand, in *Richards v. Delbridge*, L. R. 18, Eq. 11, a donor purported to make a voluntary gift of certain leasehold premises, &c., to his grandson, by an instrument endorsed on the lease, "This deed, and all thereto belonging, I give to E. B. Richards from this time forth, with all the stock-in-trade." Sir George Jessel, M. R., held this to be ineffectual, and that for a man to make himself a trustee there must be an expression of intention to become a trustee. The case is on the same line as *Tiffany v. Clarke*. Sir George Jessel said the

bill was warranted by the decisions in *Richardson v. Rogers*, L. R. 3 Eq. 686, and *Morgan v. Malleson*, L. R. 10 Eq. 475, but on the other hand was opposed by *Milroy v. Lord*, 4 D. F. & J. 264, and *Warriner v. Rogers*, L. R. 16 Eq. 340, 348; and he considered himself bound by the decision in *Milroy v. Lord*, a decision of the Court of Appeal. But in that case there was evidence that the donor did not mean to constitute himself a trustee, but did intend to vest the trust in another person.

And in *Re Breton's Estate*, 17 Ch. D. 416, Hall, V. C., held himself unable to support a gift from a husband to his wife of certain chattels evidenced by letters to her, but not followed by any delivery to her, the chattels being used by the husband and wife as before the gift. The Vice-Chancellor expresses his sorrow at the monstrous state of the law that prevented effect being given to such a gift; but upon examination of the authorities he followed *Richards v. Delbridge*, and *Milroy v. Lord*, that an imperfect gift cannot be construed to be a declaration of trust.

In *Glass v. Burt*, 8 O. R. 391, my brother Ferguson seems to have accepted the decisions in *Richards v. Delbridge* and *Warriner v. Rogers*, but the other cases I have referred to were not cited to him.

Apparently for the purpose of putting an end to such an unsatisfactory state of the law, as regards conveyances between husband and wife, the Imperial Parliament, by an Act to take effect from the 31st December, 1881, 44 and 45 Vic., ch. 41, sec. 50, enacted that freehold land or a thing in action might be conveyed by a husband to his wife; and our Legislature in 1886 copied the enactment, 49 Vic. ch. 20, sec. 6.

Considering the great conflict of opinion, in which are ranged on one side, Wood, V.C., afterwards Lord Hatherley and Chancellor, Lord Romilly, M.R., Malins, V.C.; and on the other, Turner, L.J., Sir G. Jessel, M.R., and Hall, V.C., and the final disposition of the matter by our Legislature, I think that the evident intention of the donor may be given effect to, so far at least as the beneficial interest in

the property is concerned; and I therefore make an order vesting in the plaintiff all the estate and interest of her husband at the date of the deed, 2nd September, 1885.

The plaintiff will have to pay the costs of the guardian of the defendants.

*Judgment accordingly.*

---

[COMMON PLEAS DIVISION.]

BATE V. THE CANADIAN PACIFIC RAILWAY COMPANY.

*Railways—Defective construction—Negligence—Condition limiting liability—Validity of—42 Vic. ch. 9, sec. 25 (D.)—Misdirection.*

By sec. 25 of 42 Vic. ch. 9 (D.), which is headed "Working of the Railway," it is enacted that the trains shall be started and run at regular hours, &c., and shall furnish accommodation for transportation of goods and passengers, &c., which are to be taken, transferred, and discharged at, from, and to such places on the due payment of the due tolls, freight, and fares, &c.; and the party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or its servants.

The road bed of the defendants' railway was on an embankment about fifteen feet high, built on the side of a rock which sloped into a muskeg or small lake, the embankment, it was alleged, being made by the side of the rock being filled in with loose sand, which had no cohesion, and without any retaining wall to keep the sand from slipping. The sand slipped off the side of the rock into the muskeg, and the train on which the plaintiff was travelling was thrown into the cavity caused thereby, and took fire, and the plaintiff's baggage was burnt. This part of the road had been built by contractors under the Government before the defendants acquired the road; and it was not shewn that the defendants had any notice or knowledge of the defect.

The plaintiff was travelling on the train from Ottawa to Winnipeg on a ticket procured at the company's office at Ottawa. When she went to get the ticket she asked for and obtained a return ticket, which had a condition limiting the company's liability to a sum not exceeding \$100. The agent, at the time, requested plaintiff to sign her name to the ticket, and, on plaintiff asking the reason, the agent said it was for the purpose of identification, the ticket not being transferable. The plaintiff accordingly signed her name to the ticket. The ticket was issued at a reduced rate in consideration of the plaintiff's agreement to the condition, but plaintiff was not informed, nor had she any knowledge of this, nor of the condition limiting the company's liability; and she

said she had not read the ticket because her eyes were sore, and she was unable to do so. It was, however, some hours in her possession before starting on her journey.

*Held*, [ROSE, J., dissenting], that sec. 25 only applied to negligence in the management of the train, or handling of goods during their transport, or at the point of receipt or delivery, and not to a defective construction of the road, and therefore defendants could avail themselves of the condition, which was one they were competent to make, and the plaintiff must be bound by.

*Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197; 10 A. R. 162; 11 S. C. R. 612, commented upon.

*Per CAMERON, C. J.*—The road not having been built by the defendants, they were not chargeable as an act of negligence with a defect in the original construction, without direct notice that it was not properly built.

*Per CAMERON, C. J.*, also.—Even had there been actionable negligence it was competent to the company, in consideration of a reduced rate, to limit their liability.

*Per ROSE, J.*—The damage was caused by negligence in the construction of the road, or from want of repair of the road bed, and being so caused defendants could not limit their liability.

*Per GALT and ROSE, JJ.*—There was evidence of negligence to go to the jury; and, *Per CAMERON, C. J.* If the defendants could, under the circumstances, be liable for faulty construction, he was of opinion there was such evidence.

*Fawcett v. Great Western R. W. Co.*, 1 Moo. P. C. N. S. 101, followed.

The learned Judge at the trial charged the jury that unless the plaintiff's attention was drawn to the ticket "sufficiently to make her understand that she was signing something more than ordinary with passengers obtaining a ticket to go to some particular place and return," then she was not bound by it. *Semble*, this was misdirection.

THIS was an action for damages sustained by the plaintiff from loss of baggage burned in a car of the defendant company, near Rat Portage, about the 20th September, 1886, on the occasion of an accident caused by the earth which formed the bed of the road slipping off the inclined plane of the rock into the adjoining lake.

The action was tried before O'Connor, J., and a jury, at the Ottawa Spring Assizes, 1887.

The case was opened by admissions "that the baggage claimed for by the plaintiff was personal baggage, wearing apparel suitable to her position in life; and that the value thereof is correctly stated."

The value of the plaintiff's baggage, as claimed by her, was \$1077.50.

The evidence shewed that the plaintiff, with her brother, went to the office of the company at Ottawa to get a ticket for Winnipeg. She asked for a return ticket. At the time the ticket was purchased the agent asked her to sign her



name to it. The plaintiff asked him why she was to sign it, and the agent said that the ticket was not transferable, and she was to sign it for the purpose of identification; and that she would also have to go to the office at Winnipeg, and sign her name there. The plaintiff accordingly signed her name to the ticket. She said she did not read the ticket because she said she could not do so, as her eyes were sore. She said she heard nothing about different rates, and that her brother paid the money for the ticket.

The plaintiff's brother corroborated the plaintiff's evidence. He stated that nothing was said about reduced rates or different rates; but a return ticket was asked for, and he paid for it.

The ticket was a special form of ticket, called a "Land-seekers' Ticket," and was issued at a reduced rate. The price of an ordinary ticket to Winnipeg and return was \$85, while the price of this ticket was \$55.

On the ticket was printed a condition limiting the liability of the company, in case of damage, to a sum of not more than \$100. In case of an ordinary ticket there was no such condition, and the purchaser was not required to sign it.

At the trial the learned Judge charged the jury that unless the plaintiff's attention was drawn to the ticket "sufficiently to make her understand that she was signing something more than ordinary with passengers obtaining a ticket to go to some particular place and return," then she was not bound by it." This was objected to.

The additional evidence, so far as material, is set out in the judgment.

The following questions were submitted to the jury:

1. Did the plaintiff sign the printed form produced to her by the ticket agent at Ottawa, when she asked for a return ticket to Winnipeg and back? A. Yes.

2. Upon what representation, and for what purpose, did she sign that printed form? A. For the purpose of identification.

3. Did she read it before signing, or was it read to her, or was her attention called to its special provisions, further than that the ticket was not transferable, and therefore required her signature for the purpose of identification? A. No.

4. What was the cause of the accident? Did it result from improper construction of the road-bed at that place, or from other causes? A. From improper construction of the road-bed.

5. Could the baggage have been saved by proper efforts of the company's officers and servants if they had proper appliances? A. Yes.

6. Was the train supplied with proper appliances for saving baggage in such emergency or not? A. No.

On these findings judgment was entered for the plaintiff for the sum claimed, \$1077.50.

In Easter Sittings *G. H. Watson* obtained an order *nisi* to enter judgment for the defendants.

During the same Sittings *Robinson*, Q. C., and *G. H. Watson*, supported the order. Two questions were raised. 1. Was there any evidence of negligence; and, 2. Was the contract limiting the liability of the defendants to \$100 binding on the plaintiff? In the face of *Fawcett v. Great Western R. W. Co.*, 1 Moo. P. C. N. S. 101, it cannot be successfully contended that the giving way of the embankment is not *prima facie* evidence of negligence. The question therefore is, was there negligence as a matter of fact? The principal evidence was that of Mr. Shaw, and one cannot read his evidence without arriving at the conclusion that it is of the most reckless character, and he certainly shewed a strong bias. On the other hand, the evidence of the defence was overwhelming to shew that there was no negligence. The evidence clearly shewed that the defendants had no notice of any defect in the construction of the road at the place in question, and that every precaution had been taken to guard against accidents: *Braid v. Great Western R. W. Co.*, 10 C. P. 137;

*Withers v. North Kent R. W. Co.*, L. J. N. S. Ex. 417; *Wood on Railways*, vol. 2, p. 1049; *Philadelphia and Reading R. W. Co. v. Anderson*, 39 Amer. R. 781; *Railroad Co. v. Halloren*, 37 Amer. R. 744; *Smith on Negligence*, 2nd ed., p. 245. Then as to the second point. The contract was one which the defendants were competent to make. The plaintiff says that she signed the ticket because she was told by the agent that it was necessary to do so, for the purpose of identification. It was the plaintiff's duty to read the conditions on the ticket. She said she could not read because she had sore eyes, but the company had no notice of this; and, even if they had, it would constitute no excuse. The conditions clearly exonerated the defendants from liability beyond the \$100. The statute, moreover, provided against the company relieving themselves altogether against liability; but does not prevent them from limiting their liability to a certain amount: 42 Vic. ch. 9, sec. 25, sub-sec. 4 (D); R. S. C. ch. 109, sec. 104; *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197; 10 A. R. 162, 11 S. C. R. 612; *Great Western R. W. Co. v. McCarthy*, 12 App. Cas. 218; *Manchester, &c., R. W. Co. v. Brown*, 8 App. Cas. 703. They further referred to *Redfield on Railways*, 4th ed., pp. 8, 88; *Harris v. Midland R. W. Co.* 25 W. R. 63; *Westacott v. Fargo*, 61 N. Y. 542.

*Osler, Q.C.* There was clearly evidence of negligence to go to the jury. The case of *Fawcett v. The Great Western R. W. Co.*, 1 Moo. P. C. N. S. 101, shews that the giving away of the bank is of itself *prima facie* evidence of negligence, and the plaintiff's counsel admits this. Then there is the evidence of Shaw, who was an engineer, and experienced in this kind of work, and he is corroborated by the report made to Mr. White, the superintendent. The loss of the goods also affords *prima facie* evidence of neglect: *Browne on Carriers*, p. 31; *Pittsburgh R. W. Co. v. Williams*, 74 Ind. 464. Then as to the conditions on the ticket. The evidence shews that the agent told the plaintiff that the reason she was asked to sign was, for the purpose of identification, and nothing was said about any other kind of

condition. She satisfactorily shews why she did not read the contract, namely, because she had sore eyes: *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 270. There being negligence, the condition limiting the company's liability cannot be sustained: 42 Vic. ch. 9, sec. 25, sub-sec. 4 (D.); R. S. C. ch. 109, sec. 104.

June 25, 1887. ROSE, J.—Mr. Robinson stated the questions to be two:

1. Was there negligence?
2. Was the contract limiting liability to \$100, as per printed matter on the ticket, a binding contract?

The charge of the learned Judge was objected to as contrary to law in the directions given as to the duty of the company with regard to the ticket; and generally as unduly strong in favour of the plaintiff.

It was admitted that no specific objection was or could well be taken to the charge as unfair to the defendant company; but only generally that everything was assumed against the company.

As to the first question: was there evidence to go to the jury on the question of negligence?

The case of *Fawcett v. Great Western R. W. Co.*, 1 Moo. P. C. (N. S.), p. 101, is a clear authority that the happening of an accident similar to this is *prima facie* evidence of negligence.

The language of Lord Chelmsford, at p. 116, was as follows: "There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. However, the plaintiffs did not rest their case solely on the fact of the falling in of the embankment, but called witnesses to give their opinion as to the cause of the injury."

On p. 107 of the report we find it was urged "that the jury should have been told, that the employment by appel-



lants of skilled and competent engineers, and the using good materials in the formation of the line of the railway in question, with the fact of its having been used for five years without suspicion of insecurity, and having been watched and inspected daily, was sufficient to rebut negligence; that the jury should have been told that negligence was not proved, or, if *prima facie* proved, it was rebutted, and the weight of evidence was in favour of the appellants; and that they were not bound to provide against extraordinary storms."

His lordship, at p. 118, said: "In the construction of works of a permanent character such as a railway, the amount of precaution which ought to be taken to guard against any external violence to which it may be exposed cannot be the subject of any precise rule, but must necessarily vary according to the varying local circumstances of each case."

And, at p. 120: "The railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur."

In the case before us the embankment or road-bed had been constructed for about four years; it gave way, and the accident happened. Could such an accident have been avoided by the exercise of reasonable skill, care, and caution? Was it one which could not have been foreseen as possible?

How was the bed constructed?

The evidence of one Shaw, a civil engineer and land-surveyor, who says that he examined the place carefully after the wreck, was as follows:

"Q. Will you describe the place where it occurred; what caused the accident? A. The embankment had been built on a sloping rock. I should judge the embankment to be about fifteen or eighteen feet high, built with sharp-edged sand, sea sand, coarse-grained sand, and it sloped into a muskeg or lake, a small lake. It was sloping rock, and

the toe of the bank would reach about to the water on one side, and on the other considerably higher. Q. It would be on the low<sup>er</sup> slope of a hill this embankment had fallen? A. Yes. Q. And at the bottom it was sloping rock? A. Yes. Q. Well, what was the result? What took place? A. The train of course ran into this cavity left by the bank."

The Court.—"Q. Had a portion of the road gone down the slide? A. Yes, gone into the water. Q. That is the bed of the road? A. Yes, my lord. Q. But the rails remained? A. No, they went."

Mr. O'Gara.—"Q. Was that the proper way to make an embankment over a ledge of rock of that kind? A. Not to my judgment as an engineer. Q. You have been employed, I believe, in the construction of railways? A. Yes, a good many years. Q. What should be done in order to make that a safe and proper embankment? A. There should have been a retaining wall, in a case like that, at the foot, to keep it from sliding into the muskeg; and it should have been built of different material. Q. What is the character of that coarse sand? A. Well, it has no cohesion; it is not fit for railway work. Q. Does not stick together and form a compact body? A. No. Q. And is liable to come away at any time? A. Yes, the shock of a passing train would cause it to fall; keeps slipping. I fancy the cause of this accident was from water getting at the toe of the embankment, which it melts. The sand and water from the muskeg might have turned into a kind of quicksand."

Mr. Robinson commented upon the evidence of this witness as open to the charge of bias; and certainly his statement as to neglect, in the endeavour to save the baggage, seems to one, who must gather knowledge from the evidence, as much too strong. That was a matter, however, merely for observation; and the learned Judge observed upon it in his charge. It must be admitted that in this respect the charge was favorable to the plaintiff. But the evidence cannot be rejected on that ground.

A Mr. Pearson, a commercial traveller, said, in answer to the question, "Of what was the embankment composed? A. Built of nothing that I could see but sand. If there had been timbers they had rotted away."

The report by Wm. White was put in by the plaintiff; and appears on the notes as follows:

Mr. O'Gara puts in the following portion of the examination under oath of Charles Drinkwater, secretary of the Canadian Pacific Railway Company:

"I have received a letter or report, dated the 6th of October, 1886, made by William White, General Superintendent of the Western Division, to the Vice President, and I herewith produce it as Exhibit "E." This is one of the official reports, the one sent to the head office; all other reports being documents of the Western Division."

The portion of the official report is as follows: "The track where the accident occurred is built on a sloping side hill, and on a curve. The material on the north side, or tail of the dump, consisted of *loose sand*; and there appears to have been a low trestle put in originally at this point, probably by the contractors during the construction, and subsequently filled up. I understand that the filling was all done during the time that the road was operated by the Government, and no work has since been done on it other than the ordinary surfacing and ballasting; and there has never been any trouble at this point before. Immediately after the accident the embankment appeared as if *it had slipped off the side hill into the lake*, and heaved up the bottom of the lake fifteen feet away several inches above the surface of the water."

The jury, on this evidence for the plaintiff, have chosen to find negligence. If they believed it they could well have so found. In my opinion the report confirms, rather than weakens the evidence of Shaw and Pearson.

For the defence, the conductor said that the accident was caused by "part of the bank of the dump going down into the lake."

Johnston, the road-master, said the road-bed or embankment was composed of "clay and ballast:" that the bed would be about twelve feet wide, and the bottom or natural incline on which the bed was rested was twelve feet high on one side and eight feet on the lower, thus giving a fall of four feet in twelve: that it "slid down:" that the lowest part of the material of the road-bed was "clay, partly rock, what we found at the bottom," built "on a curve" "on the hill side:" that he was unable to say upon what kind of a foundation it was built: that in repairing a permanent bridge was erected, and filled in with ballast."

Napoleon Montellette, section foreman, said that there never had been any framework, bridge, or trestle there before the accident, and that the bank—"the dump"—was composed of gravel, sand, and clay.

William Dayley, superintendent of the work for the contractors, said that the rock was thrown in loosely from the cars which were backed up, and the rock "dumped in."

There were other witnesses for the defendants, who spoke of the work being well done; and that there was nothing further required from an engineering stand-point; but, so far as I have observed, no theory was propounded shewing any cause for the accident, in answer to that suggested by the plaintiff's witnesses, that for want of a retaining wall, the bed gave way and "slid off" the foundation.

It seems to me impossible, upon this evidence, to say that the jury had not evidence upon which they might reasonably find negligence.

I may not quite understand the effect of the report of White; but I confess it leaves a very strong impression on my mind that a mistake was made in the construction which permitted the embankment to slip off the side hill into the lake.

I do not think it well to relieve railway companies from the burden, which should be felt onerous, of using every known means to provide safe means of transit for their passengers. Hardship may ensue in particular cases; but



it seems to me to be well for all to realize the supreme necessity of running no risk that can be avoided. I know it is to the financial advantage of every company to have its works in good order ; but possibly every company is willing to run some risk to avoid expense. However that may be, I do not feel justified in interfering with the verdict on the evidence. The negligence here was not only in original construction, but in allowing the road-bed to remain in its unsafe condition. This was or should have been seen every time the track was examined, and so the negligence of the original builders became, by continuance, the negligence of the defendant company. To construe the Act as relieving a railway from liability for a dangerous road-bed, but to make it liable for a misplaced switch, would be a refinement that, in my opinion, should not be given effect to. When a company undertakes to carry passengers or freight safely and securely, and deliver them or it at the point of destination, but fails to do so because its road-bed gives way from negligence in its construction, or from negligent want of repair, it seems to me that any damage arising from such negligence is within the damage that the statute prevents the company freeing itself from by contract.

As to the Judge's charge, it certainly favoured the plaintiff, but no legal objection can be framed to it on the question of negligence ; and the learned Judge may have, as was his right, felt strongly that there was negligence. If so, his giving expression to such opinion would form no ground of objection to the charge, if he left the question finally to the jury.

In the view I take of the finding as to negligence in construction, it does not, in my opinion, become necessary to determine whether the contract limiting the liability to \$100 was one from which the plaintiff would be relieved by what took place at the time of the sale to her of the ticket, as I think, under *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197, 10 A. R. 162, 11 S. C. R. 612, the limitation cannot avail to the company.

Were the question one necessary to be decided, I would have difficulty in accepting the view of the learned Judge at the trial, that under the circumstances the defendant company should have explained the meaning of the contract, or that the plaintiff could be heard to say she was misled by what took place at the time of sale.

Mr. Robinson cited *Watkins v. Rymill*, 10 Q. B. D. 178. I may refer to authorities collected in *McMillan v. Grand Trunk R. W. Co.*, 12 O. R. 103.

If an intelligent, educated person, who writes her name twice upon a ticket, which remains in her possession for some hours before she uses it, has no duty placed upon her to read what she has signed, then it would be impossible to enforce ordinary agreements. When she was told that she was required to write her name upon the ticket for the purpose of identification she was told what was strictly true, and such information did not, in my opinion, excuse her from reading her ticket; and, if she read, retained, and used it without objection, she surely must be held to have accepted its terms and conditions.

But the *Vogel* case decided that under the statute the defence against liability was taken away from the company where the damage was caused by negligence; and, in my opinion, the provisions of the Act extend to prevent limitation of liability quite as well as to prevent denial of liability. To accede to the contrary argument would be to hold that whereas by the statute, in cases of negligence, the company must admit the liability to pay the damage resulting from such negligence, yet it could, by express notice or condition, avoid payment of the damages by limiting the liability to a nominal sum.

When the statute says that the company shall not be released from an action by a party aggrieved, if the damage arose from negligence of the company or its servants, I take it to mean that the company shall be liable not only to the action, but also to pay the damage sustained, and that damage means just what it expresses—the loss to the party aggrieved—and not such portion thereof as may be fixed by the company.

The question of the statute was not raised at the trial, so far as appears by the notes, but was fully argued before us, and I think takes away the company's defence, if I am right in my view as to the sufficiency of the evidence to sustain the finding as to negligence.

I am not at all satisfied with the finding of the jury that the baggage could have been saved by proper efforts of the company's officers and servants if they had had proper appliances. I confess the evidence leads my mind to the conclusion that the rapid spread of the fire, and the necessity to exert every means to save those who were in danger of losing their lives, prevented the saving of the baggage; and that there was no proper charge of neglect against the company in respect of the destruction of the baggage, apart from the negligence in the construction of the road-bed.

I think the motion fails, and must be, dismissed, with costs.

CAMERON, C. J.—The points raised by the defendants' motion are new, not, as far as I am aware, having heretofore received judicial consideration. *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. 162, 11 S. C. R. 612; *Martin v. Grand Trunk R. W. Co.*, 10 A. R. 162, and *McMillan v. Grand Trunk R. W. Co.*, 12 O. R. 103, only go the length of shewing that railway companies cannot, by notice, or express contract, relieve themselves from an action in respect of an injury to the person of a passenger, or loss, or damage to goods, resulting from direct negligence on the part of the company, or their servants, during the transport of such passenger or goods. They do not decide that for a benefit and consideration accruing directly to the passenger or shipper he may not stipulate that, in the event of such injury or damage arising through such negligence, his damages shall not exceed a certain amount; thus, as it were, fixing a maximum limit for the assessment of such damages. Nor do these cases determine that a remote act of negligence, such as an

imperfect construction of the road-bed or a bridge years before, is such negligence as comes within the kind of negligence railway companies may not protect themselves against. The statute, it appears to me, was designed to cover such acts of negligence as related to the management of the train, or handling of the goods by the companies during their transport, or at the point of receipt or delivery.

Sec. 25 of sub-sec. 2, 42 Vic., ch. 9, the Act in force at the time the plaintiff's alleged cause of action arose enacts: "The trains shall be started and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting, and at the junctions of other railways, and at usual stopping places established for receiving and discharging any passengers and goods from the trains."

Sub-sec. 3. "Such passengers and goods shall be taken, transported and discharged at, from, and to such places on the due payment of the toll, freight or fare legally authorized therefor."

Sub-sec. 4. "The party aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company; from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants."

These provisions are all based upon the railway being in actual operation as a going concern, and the negligence intended to be covered is negligence in the management of the train carrying the passengers or goods, and was not designed to extend to a defective or faulty construction of the railway. "Any neglect \* \* in the premises" means any neglect of the company or its servants in the transport or delivery of the goods, by reason of which neglect, in reference to the particular passenger or goods, the injury or damage was caused, and does not extend to an unfor-



seen accident, resulting from no negligence in connection with the immediate carriage of the passenger or goods.

The part of the road in question was not built by the defendants; and, without some direct notice to them that it was not properly built, notwithstanding the decision in *Fawcett v. Great Western R. W. Co.*, 1 Moo. P. C. N. S. 101, I do not think a defect in the original construction is chargeable as an act of negligence of the defendants; and on this ground I think the action should be dismissed.

But I am also of opinion the contract entered into by the plaintiff with the defendants was one she was competent to make, and must be bound by.

The obligation of the defendants was only under the statute to receive the plaintiff and her baggage on the due payment of the toll, freight or fare legally authorized therefor, that is, such freight or fare as would be chargeable without any special contract or terms; and it was competent and proper for the company to stipulate, in consideration of the reduced rate of carriage received from the plaintiff, that while they might not wholly relieve themselves from responsibility on account of the negligence of their servants, they might stipulate the liability should be limited.

The argument against this is, that the liability might be fixed at so low a sum as to render the Act nugatory. Assume that to be so, if it does not deny to the plaintiff her action, why should she not be allowed to assess her damages at such figure as she and the defendants agree upon in consideration of the advantage accruing to her from the reduced fare? The amount of damages cannot be ascertained in an action with exact certainty. Where the injury is to the person, the damages must necessarily be speculative, and incapable of accurate computation. When goods are damaged or lost, the extent of the damage or value of the goods must depend upon the opinion of witnesses; and why should not the parties, to avoid any uncertainty in the matter, agree upon a minimum or maximum limit of valuation?

In *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197, the Queen's Bench Division only determined two points—first, that the Act applied to the Grank Trunk Railway; and second, that the company could not by the terms in their shipping bill in that case relieve themselves from responsibility for the negligence of the company, or its servants, whether it was matter of contract or condition.

Chief Justice Hagarty, in delivering judgment, at page 205, said: "In England the companies sometimes adopt a reduced tariff for goods, and are allowed to limit their liabilities in certain cases as to those who elect to take advantage thereof. I desire to express no opinion as to their right, when they carry a drover or other person free, to take from him a valid agreement to release them from liability for injuries caused by negligence. The plaintiff's damage in this case is conceded."

It is thus manifest that the learned Chief Justice has guarded himself against holding that a contract like the present may not be supported. I concurred in that judgment on the facts appearing in it. The weight of individual judicial opinion, numerically considered, I think is in favor of the right of the defendants to make the contract that was made in this case. Chief Justice Wilson, who tried the *Vogel* case, was of that opinion; and this was concurred in by Burton and Patterson, JJ., in Appeal, and by Mr. Justice Strong and Mr. Justice Taschereau in the Supreme Court; while Chief Justice Hagarty guarded himself against being taken to have determined the liability of the defendants in a case like the present. The other members of the Queen's Bench, in *Vogel's* case, delivered no formal opinion. But I am under the impression my brother Armour was of the opinion the defendants could not relieve themselves from responsibility by contract in any case where the injury or damage was the result of negligence. I inclined to the view that they could, where the contract conferred a benefit or advantage upon the passenger or shipper in the abatement of fare or freight. Thus the number of Judges taking part in

deciding *Vogel v. Grand Trunk R. W. Co.*, favouring the non-liability of defendants under the circumstances of this case, is six, with one not expressing an opinion. And the number of those taking the opposite view is six, namely, Sir Wm. Ritchie, C. J., Justices Fournier and Henry of the Supreme Court, Justices Osler and Morrison of the Court of Appeal, and Mr. Justice Armour of the Queen's Bench.

Under these circumstances I do not think I am precluded by authority from expressing the opinion that the defendants here are not liable.

If these defendants can, under the circumstances presented by the case, be liable for original faulty construction not brought to their notice, there was evidence to go to the jury of such faulty construction; and the fact that the evidence was conflicting will not of itself warrant an interference with the finding of the jury and the granting of a new trial. If, in law, the plaintiff has a right to maintain her action for any larger sum than \$100, and the faulty construction of the railway is negligence on the defendants' part, the verdict of the jury could not be properly interfered with. But for the reasons I have endeavoured to express I do not think the defendants are liable in law; and therefore am of opinion the plaintiff's action should be dismissed with costs.

GALT, J.—I concur in the opinion expressed by the Chief Justice, that the negligence complained of in this case is not such as is contemplated by the Legislature in the Consolidated Railway Act of 1879, under sec. 25. That section is headed "Working of the Railway;" and all the provisions have reference to the management of the trains. There is no reference whatever to the construction of the road.

The question of negligent construction was left to the jury, and they have found a verdict in favour of the plaintiff.

There were several positions of law laid down by the learned Judge in his charge, and which are also adopted by my learned brother Rose, based on the judgment of the Privy Council in the cases of *Braid v. Great Western R. W. Co.*, 10 C. P. 137, and *Fawcett v. Great Western R. W. Co.*, 1 Moore P. C. N. S 101. The law as laid down in that case has been often questioned in the case of *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14; but no doubt it is binding on us; and therefore the verdict cannot be interfered with on that account.

I quite agree with the remarks made by my brother Rose as respects the condition being binding on the plaintiff; but, for the above reason, I do not think the defendants are precluded by the fact that the jury have found they were guilty of neglect in the construction of the road from availing themselves of it.

I therefore agree with the Chief Justice that this action should be dismissed, with costs.

*Order absolute.*

---



## [COMMON PLEAS DIVISION.]

## REGINA V. M'CAULEY.

*Intoxicating liquors—Indians, selling liquor to—Sale by wife—Service on wife—Conviction of husband—Jurisdiction of Indian agent—Order preventing action against Magistrate—Power of single Judge to quash conviction—Appeal to Divisional Court.*

An information for selling liquor to certain named Indians, but without describing them as of any particular tribe or locality, was laid by R. of the township of Rama, before D. M., described as "an Indian agent by Royal Authority duly appointed," and alleged that defendant and Fanny, his wife, or one of them, did on, &c, sell, &c., to the said Indians spirituous liquors contrary to the statute, &c. The summons issued thereon described D. M. as Indian agent, and shewed it was issued at Rama township. It was directed to the defendant and his wife, described as of Rama township, and was personally served on the wife and a copy left with her for her husband at their most usual place of abode. This was proved by affidavit of service. The enquiry was held at Rama before D. M. as Indian agent, and he subscribed the different depositions as "Indian agent of the Chippewas of Rama," *ex officio* Justice of the Peace. The conviction was that on, &c., "at Rama Indian Reserve, in the township of Rama," the defendant "is convicted before D. M., Indian agent for the Chippewas at Rama, *ex officio* Justice of the Peace for the purpose and under the Indian Act 1880, for that he did on, &c., at the township of Rama, unlawfully sell to certain Indians, &c." The warrant of commitment recited that the conviction was before D. M., as Indian agent of the county of Ontario. The liquor was sold at defendant's hotel, in the township of Rama, by the defendant's wife, the husband being away at the time and for some time afterwards. There was nothing said to D. M. to shew why defendant was not present at the enquiry; and D. M. had no reason to believe that the case was other than a neglect or refusal to attend. In support of this application, defendant stated that he knew nothing of the summons having been issued, or of the proceedings thereon, and never authorized any one to act for him.

*Held, per WILSON, C. J.,* that the service was regularly made, and duly proved before the Indian agent, and he was justified in proceeding to investigate the charge; and that the act of the wife was in law that of the husband, and that he could be convicted therefor.

*Quære*, whether D. M.'s appointment was as an Indian agent of the Chippewas of Rama, or for the county of Ontario, but the latter might include the former and so give jurisdiction.

*Held*, however, the conviction could not be supported, for none of the proceedings showed that the Indians to whom the liquor was sold were Indians over whom the agent had jurisdiction, as it did not appear they were Chippewa Indians, or Indians residing within the township, or even in the county.

The discharge of the defendant was granted, but the learned Chief Justice directed that, so far as necessary, and he had power to do so, no action should be brought against the Indian agent.

A substantive motion was made before Armour, J., to quash the conviction which was granted, he also directing no action to be brought against the Indian agent.

On appeal to the Divisional Court against so much of the judgments as prevented an action being brought, the appeals were quashed.

*Quære*, whether a single Judge has power to hear such 'motions to quash convictions. If he has power his decision is final, and not appealable. If he has no power, then his action is of no avail, and still unappealable.

THIS was an application against a conviction of the defendant for selling liquor to Indians, and subsequent proceedings, and for the discharge of the defendant.

The information was laid by Simeon Rocky-Mountain, of the township of Rama, labourer, on the 17th of November, 1886, before Duncan McPhee, an Indian agent, by Royal authority duly appointed, who said he was informed and believed that Alexander McAuley, of Rama, and Fanny, his wife, or one of them, did, on the 13th of November, 1886, sell, exchange with, barter, supply, or give to the following named Indians [naming five of them], or some or one of them, spirituous, fermented, or intoxicating liquor, contrary to the statute 42 Vic. ch. 28, the Indian Act (1880), and amendments thereto.

A summons was issued directed to McAuley and Fanny, his wife, requiring them to appear and answer the charge ; and there was an affidavit of service of the summons on the 18th November, the deponent stating that on that day he served "Alexander McAuley and Fanny, his wife, with the within summons by delivering two copies of the same to, and leaving the same with, Fanny McAuley for herself and for the said Alexander McAuley at their most usual place of abode in Rama."

*Rocky-Mountain* said, at the examination before Duncan McPhee, the Indian agent at the Rama Reservation at Rama : "I was at the Temperance Hall on the 13th of November, at a temperance meeting held there. While there Gilbert Williams, Moffatt Bigwind, and Samuel Snake came there drunk. I believe they had with them a pail that had beer in. I believe beer from the smell of it. I can judge liquor by smelling it, because I drank a lot of it when I was young."

Cross-examined by Mr. *Gettings* : "I did not drink any of the contents of the pail. The, boys, were lying down when I found them, and could not get up."

*Gilbert Williams* said, that on 13th November David Simcoe was at Alexander McAuley's hotel. He asked witness to come in and have a drink. He had a pail which had beer in it. Four drank contents of the pail—David Simcoe, Moffatt Bigwind, Samuel Snake, and witness. After drinking contents of the pail, they all went into the hotel. Mrs. McAuley was in. Simcoe asked her to give us some whiskey, and she gave us three or four drinks of whiskey, which Simcoe paid for. Peter Jacobs was inside when we went in. Then Simcoe treated. Peter asked for whiskey, and he got it. He remembered Peter drank that time. Mr. Gettings was there also: he was, he believed, a little drunk.

Peter Jacobs said he was at Alexander McAuley's hotel on 13th November. "Mrs. McAuley was serving the, 'boys,' with drink. Simcoe treated. I asked for whiskey, and Mrs. McAuley gave it to me. I got two glasses of whiskey that evening. Simcoe, Bigwind, Williams, and Snake were the only Indians present that evening. Mr. Gettings and Mr. English were there."

The conviction was: "Be it remembered that on the 25th of November, 1886, at Benson Hall, Rama Indian Reserve, in the township of Rama, Alexander McAuley, of the township of Rama, aforesaid, is convicted, before the undersigned Duncan McPhee, Indian agent for the Chippewas of Rama, *ex officio* a Justice of the Peace for the purposes of and under the Indian Act, 1880; for that he, the said Alexander McAuley, on the 13th of November, 1886, at the township of Rama, did unlawfully sell to certain Indians—to wit, to David Simcoe, Gilbert Williams, Moffatt Bigwind, Samuel Snake, and Peter Jacobs—intoxicating liquor—to wit, whiskey, to the said Indians, not having been made use of by them, or any of them, in the case of sickness under the sanction of a medical man or under the directions of a minister of religion, such sale to the said Indians being contrary to the Indian Act, 1880; Simeon Rocky-Mountain being the complainant. And I adjudge the said Alexander McAuley, for his said offence, to forfeit and pay the sum of \$50, to be paid and applied according to law; and also to pay to the

said Simeon Rocky-Mountain the sum of \$1.85 for his costs in that behalf; and, if the said several sums are not paid forthwith, I adjudge the said Alexander McAuley to be imprisoned in the common gaol of the said county of Ontario, and there to be kept at hard labour for the term of ninety days, unless the said sums and the costs, and charges of conveying the said Alexander McAuley to the said common gaol are sooner paid. Given," &c.

A warrant of commitment was issued upon the conviction, on which the defendant was arrested at Rama on the 6th of April, instant, and committed to gaol.

The warrant recited that: "Whereas Alexander McAuley was this day convicted before me, the undersigned, an Indian agent for said county of Ontario," &c. It was subscribed "Duncan McPhee, Indian Agent."

He swore he was not personally served with a summons to appear to answer the charge against him, and that he had no notice or knowledge of any proceedings against him before the said Duncan McPhee, except from a newspaper report which he read sometime after the date of the warrant. He said he left his home in Rama on or about the 3rd of October, 1886, and proceeded to a lumbering shanty in the township of Longford, in the county of Victoria, where he remained continuously till on or about the 21st of February, 1887, when he returned to his home in Rama. He asserted in this later affidavit he was not personally served with any summons, nor was he aware of any charge being laid against him until he saw it in the newspaper before mentioned. He did not, in fact, commit the offence charged, and he was wholly innocent of it. In another affidavit he further said he did not instruct or authorize any person to appear for him before the said McPhee, or to cross-examine witnesses on his behalf, or in any way to act for him in respect of the said charge.

These facts were not contradicted.

The proceedings were removed by a writ of *certiorari*, and a writ of *habeas corpus* was also issued.



*George Bell*, for the defendant. This was a matter of jurisdiction, and *certiorari* was not taken away. The defendant was not personally served with a summons to appear and answer the charge, nor had he any notice or knowledge of the summons, or of any charge being made against him until after his conviction, nor did he authorize any one to appear or act for him : *Regina v. Ryan*, 10 O. R. 254. It does not appear that the place where the offence was committed was within the locality for which the said Duncan McPhee was Indian agent, or was in the county of Ontario : *Regina v. Chandler*, 14 East 267. The combined operation of R. S. O. ch. 43, secs. 94-117, are insufficient to enable an Indian agent to act off an Indian reserve in the province of Ontario. The conviction does not state that Duncan McPhee, the Indian agent, acted as a justice of the peace for the locality ; nor that the informer was corroborated, the informer, by the Act, being required to be a credible witness ; nor the place where the alleged offence was committed with certainty ; and it states a multiplicity of offences by sales to different persons. The warrant of commitment is defective in all these respects.

*Aylesworth*, for the Indian agent, contra. The service was sufficient. The act of the wife was, under the circumstances, that of the husband. The conviction was valid, and so was the warrant of commitment. The Indian agent had power to adjudicate upon the charge. He referred to 43 Vic. ch. 28, sec. 90, (D.) ; 44 Vic. ch. 17, secs. 10, 12, (D.) ; R. S. C. ch. 43, sec. 94 ; 45 Vic. ch. 30, secs. 3, (D.) ; 47 Vic. ch. 27, secs. 22-3, (D.), and sec. 15, made by that Act sub-sec. 2 of 43 Vic. ch. 28, sec. 97 ; *Regina v. Wallace*, 4 O. R. 127 ; R. S. C. ch. 43, sec. 117 ; *Regina v. Campbell*, 8 P. R. 55 ; *Regina v. Howard*, 45 U. C. R. 346 ; *Regina v. Williams*, 42 U. C. R. 462.

*Delamere*, for the Crown.

April, 27, 1887. WILSON, C. J.—The first question is whether the defendant could be proceeded against as he was proceeded against in respect of the charge, by the sum-

mons being delivered to his wife although in the husband's house, for the sale of liquor made by his wife in his absence, and when he had been absent from the county from about the 3rd of October, 1886, continuously, as appears, up to the time of the sale of liquor upon the 13th of November, and from that time onward until about the 21st of February, 1887, and having had no knowledge of such sale of liquor, nor of the proceedings which were taken against him for it until some time after the conviction was completed ?

The 32-33 Vic. ch. 31, sec. 2 (D.), requires that the "summons shall be served \* \* by delivering the same to the party personally, or by leaving it with some person for him at his last or most usual place of abode."

The person serving the summons is to attend at the time and place and before the Justice in the summons mentioned to depose, if necessary, to the service thereof: sec. 3.

Sec. 7. If the party summoned "fails to appear in obedience to the summons, then, if it be proved upon oath or affirmation to the Justice or Justices present that a summons was duly served upon the party a reasonable time before the time appointed for his appearance, the Justice or Justices of the Peace may proceed *ex parte* to the hearing of the information or complaint, and adjudicate thereon, as fully and effectually to all intents and purposes as if the party had personally appeared before him or them in obedience to the summons."

The summons was issued at the township of Rama on the 17th of November, 1886. It was served on the 18th, the deponent stating that on that day he served "Alexander McAuley and Fanny McAuley, his wife, with the within summons, by delivering two copies of same to, and leaving same with, the said Fanny McAuley for herself and for the said Alexander McAuley, at their most usual place of abode in the township of Rama."

The case was heard before the magistrate on the 25th of November in the township of Rama. The informant and two other witnesses gave evidence in support of the charge.

The charge was, that the sale of the liquor was made by Mrs. McAuley, not by her husband, who was, no doubt, away from home at the time and for some time after it.

There was nothing said to the magistrate, from the papers before me, why Alexander McAuley was not present at the enquiry ; nothing said of his not being at his home or residence at the time.

So far as the proceedings before the magistrate shew, it does not appear he knew or had reason to believe the case was any other than a neglect or refusal of the husband to attend. The service was therefore regularly made and duly proved before the magistrate ; and he was justified in proceeding, as he did, to investigate the charge.

The next enquiry is, whether the magistrate proceeded properly in convicting the husband for a sale made by his wife of spirituous liquor in the husband's house, which is called a hotel, in his absence from the house, (the fact of the husband's absence at the time not appearing to have been made known to the magistrate, if that be of any consequence) ?

The evidence shewed the defendant then kept a hotel in Rama where the liquor was sold. A hotel is a place where liquor may be sold, but not to Indians, and the sale complained of was to Indians. The wife may be considered as the agent of the husband in carrying on the hotel, and more particularly in his absence. She did sell the liquor in fact. It will not be assumed that in merely selling liquor she was doing an unlawful act. She was, therefore, doing an act in the ordinary and legitimate business of a hotel keeper.

But the illegality consists, not in the mere selling of the liquor, but in selling it to Indians, to whom personally the sale of liquor is interdicted by statute.

I am of opinion, therefore, the act of the wife was, in law, the act of the husband. There are several cases of the kind.

A person in the employ of another who sells a libellous article for that other is the agent of his employer in doing that act, and the employer is responsible for it.

There are numerous cases in which a wife doing business for her husband is held to be his agent.

So a woman may be convicted with her husband of keeping a house of ill-fame; and that would shew the husband might be convicted of the offence if his wife carried it on with his knowledge, although he was temporarily absent while she had charge of the house.

If the liquor had been lawfully sold, no doubt the husband could recover for it, unless there was some special cause to prevent it.

I am of opinion the husband could be convicted for the sale made by the wife.

The next enquiry is, whether Mr. McPhee, the Indian agent, had the power to adjudicate upon the charge in question?

The proceedings were taken and carried on under the Indian Acts.

The section which applies here is sec. 90 of the 43 Vic. ch. 28, (D.) The part of it which is applicable is the first part: "Whoever sells, exchanges with, barter, supplies, or gives to any Indian or non-treaty Indian in Canada, any kind of intoxicant, or causes or procures the same to be done \* \* shall, on conviction thereof before any judge, stipendiary magistrate, or two justices of the peace, upon the evidence of one credible witness other than the informer or prosecutor, \* \* be liable to imprisonment for a period not less than one month nor exceeding six months, with or without hard labour, or be fined not less than \$50 nor more than \$300, with costs of prosecution—one moiety of the fine to go to the informer or prosecutor and the other moiety to Her Majesty, to form part of the fund for the benefit of that body of Indians or non-treaty Indians, with respect to one or more members of which the offence was committed; or he shall be liable to both fine and imprisonment in the discretion of the convicting judge, stipendiary magistrate, or justices of the peace \* \*: but no penalty shall be incurred in case of sickness where the intoxicant is made use of under the sanction of a medical man or under the directions of a minister of religion."



The 45 Vic. ch. 30, (D.) enacts that, wherever power is given in The Indian Act, 1880, or in the 44 Vic. ch. 17 (D.), or "in this Act," to "any stipendiary magistrate or police magistrate to dispose of cases of any infraction of the provisions of the said Acts" brought before him, any Indian Agent shall have the same power as a stipendiary magistrate or a police magistrate has in respect to such cases.

The 44 Vic. ch. 17 sec. 12 (D.), also enacts, that: "Every Indian commissioner, assistant Indian commissioner, Indian superintendent, Indian inspector or Indian agent shall be *ex officio* a justice of the peace for the purposes of this Act." "The term agent includes a commissioner, superintendent, agent, or other officer acting under the instructions of the superintendent-general."

There appears to be no doubt that *any Indian Agent* has the all the powers under the statutes above mentioned, and to adjudicate upon a case of this kind in like manner as a stipendiary magistrate has under the 43 Vic. ch. 28, sec. 90 (D.), who is specially named in that section.

The stipendiary magistrate, Indian agent, or justice of the peace, must of course be appointed to exercise his jurisdiction within some prescribed area.

Does it appear that Mr. McPhee was Indian agent for any defined area or locality? And, if so, for what locality? Or that he was agent for any particular reserve or body of Indians? He describes himself as follows; and he shews where he acted and where the offence was committed:

The information states it was laid before him "an Indian agent by Royal authority duly appointed" at "the township of Rama in the county of Ontario;" and the jurat describes him as "Indian agent for the Chippewas of Rama, *ex officio* justice of the peace under the Indian Act, 1880 and amendments thereto."

The summons describes him as "Indian agent," and shews he issued the summons at *Rama township*, and directed it to the defendant and his wife, who are described as of the township of *Rama*. The enquiry was held at *Rama* before Mr. McPhee as Indian agent; and he subscribes

the different depositions as "Indian agent for the Chippewas of Rama, *ex officio* justice of the peace."

The conviction begins: "Be it remembered that on the 25th day of November, 1886, at Benson Hall, Rama Indian Reserve, in the township of Rama, in the county of Ontario, Alexander McAulay, of the township of Rama aforesaid, is convicted before the undersigned Duncan John McPhee, Indian agent for the Chippewas of Rama, *ex-officio* Justice of the Peace, for the purposes of and under Indian Act, 1880, for that," &c.; and it is subscribed by Mr. McPhee in substantially the like manner.

The warrant of commitment recites that "whereas Alexander McAulay was this day convicted before me, the undersigned, Indian agent for said county, for that," &c.; and it is subscribed "Duncan McPhee, Indian agent."

It is quite clear Mr. McPhee carried on all his proceedings in the township of Rama, and that the alleged offence was committed there, and the defendant's home and residence were there.

It appears also he was "Indian agent for the Chippewa Indians of Rama."

As to his being *ex officio* a justice of the peace, is of no consequence, for as a justice of the peace he could not have made this conviction, for the 43 Vic. ch. 28, sec. 90, (D.), requires *two justices* to convict; so it does not matter that he does not describe himself as a justice of the peace for any particular locality; although it might be assumed he would be a justice of the peace for the locality for, from, and over which his *ex-officio* title and power arose and extended.

The commitment is more particular, for it recites that Mr. McPhee was "Indian agent for said county," that is, for the county of Ontario.

In all the proceedings before the warrant of commitment he describes himself as "Indian agent for the Chippewa Indians of Rama," and in the warrant as "Indian agent for the county of Ontario." He might, however, be Indian agent for the county including the township of Rama, and

so be agent in that sense for the Chippewa Indians of Rama; and he might, perhaps, although not quite correctly, but sufficiently to sustain this conviction, describe himself as "Indian agent for the Chippewa Indians of Rama," as the offence was committed in that township and the defendant resided there, and, also, the proceedings were carried on there.

If Mr. McPhee was the agent for the county, and if he was describing his titular office, appointment and jurisdiction, as I am rather of opinion he was, then he was not acting as agent for the Chippewa Indians of Rama, but by virtue of his office and appointment as the Indian agent for the county of Ontario. But I do not think that would invalidate his acts, for as agent for the county he would have jurisdiction over the Indians of Rama.

There is a further point to be considered with respect to jurisdiction, which is, that if Mr. McPhee was the Indian agent for the Chippewa Indians of Rama, should he not have shewn that the Indians to whom the liquor was sold were *Chippewa* Indians? He had, from his own statement, the appointment, authority, and jurisdiction over no other than that particular body of Indians; and it does not appear these were Chippewa Indians, or that it was a Chippewa Indian reserve, or that there was no other tribe, band, or body of Indians in Rama than Chippewas. Judicially it does not appear, at or up to the time of conviction, Mr. McPhee had jurisdiction over any of these Indians to whom the liquor was sold, for it does not appear they were, or that any one of them was, a Chippewa Indian. But if it be assumed that it was shewn, still it does not appear that any of the four named Indians who got the drink complained of, was shewn to have been an Indian residing in the township of Rama or even in the county of Ontario; and it does not appear that Mr. McPhee, as Indian agent of the Indians of Rama, had jurisdiction over any Indians not residents of the township or of the county, even although they were Chippewa Indians.

The first objection I have stated, that Mr. McPhee has described himself as Indian agent for the *Chippewa Indians*

of *Rama* in the proceedings before the warrant of commitment, and Indian agent for the *county of Onturio* in the warrant, shews an authority which, so far as mere locality is concerned, might be consistent by reason of the township being within the county as before stated; and the warrant might be supported as valid, for it is not to "be held void by reason of any defect therein, provided it is therein alleged that the person has been convicted and there is a good and valid conviction to sustain the same:" 47 Vic. ch. 27, sec. 15, (D.)

And that raises the question, is there a good and valid conviction to sustain the warrant?

The second objection I have mentioned is, that none of the proceedings, including the warrant of commitment, show any one of the four Indians who got the liquor was a *Chippewa* Indian; but, if that is to be assumed,—and it would be difficult to do so,—not one of the four is shewn to have been a *Rama* Indian. They may, for any account given of them, have been resident in a different township or county, having a home or residence in a different reserve and under the jurisdiction of another Indian agent than Mr. McPhee.

I am of opinion either of these objections just named is valid; and, the two together, I do not see how they can be answered.

I am, therefore, of opinion I must make the order absolute for the discharge of the defendant; for I am of opinion the conviction and warrant for enforcing the same, are invalid for the insufficiencies therein, and that I must so decide; for "upon perusal of the depositions," I am satisfied that, although *an offence* of the nature described in the conviction or warrant has, in a general sense, been committed, such an offence has not been committed in respect of persons over whom the Indian agent had jurisdiction; and, in that sense, which must of necessity be the true reading and construction of the Act, "an offence has not been committed, over which Mr. McPhee is shewn to have had jurisdiction." I refer to the late enactment



of 49 Vic. ch. 49, sec. 2 (D.), now in the R. S. C. ch. 178, sec. 87.

It is not necessary I should further examine the case. I give no opinion, therefore, on any matter upon which I have not expressly decided. The notice is simply to discharge the defendant from custody ; and that is what I feel obliged to do.

The order will, therefore, be absolute for that purpose.

I aid, so far as there is any necessity, or so far as I have the power, I direct that no action shall be brought against the Indian agent for or in respect of the said imprisonment of the said defendant.

A substantive motion was subsequently made before Armour, J., to quash the conviction. The learned Judge quashed the conviction, but imposed the condition "that no action be brought against the said Duncan McPhee for or in respect of anything done under the said conviction, or against any officer acting under the warrant to enforce the said conviction."

In Easter Sittings, May 21, 1887, *George Bell* moved by way of appeal from so much of the order of Wilson, C.J., made herein, directing the discharge of the prisoner upon a writ of *habeas corpus* as imposed a condition that no action of trespass should be brought against the convicting magistrate ; and on the 27th of May moved further by way of appeal from so much of the order of Mr. Justice Armour, quashing the conviction, as imposed the condition "that no action be brought against the said Duncan J. McPhee for or in respect of anything done under this conviction, or against any officer acting under the warrant issued to enforce the said conviction."

During the same Sittings *George Bell* supported the motion.

*Aylesworth*, contra.

June 25, 1887. ROSE, J.—The clause in the order of the learned Chief Justice of the Queen's Bench Division was as follows: "And it is ordered that, so far as there is any necessity, or so far as there is power so to order, no action be brought against the said Indian agent for or in respect of the said imprisonment of the said defendant."

The conviction was by Duncan J. McPhee, an Indian agent for the county of Ontario, for selling liquor to Indians contrary to the provisions of the Indian Act of 1880 and amendment thereto.

The *certiorari* was issued pursuant to the order of Mr. Justice Robertson, tested in the name of the President of the High Court at Toronto, and returnable "to us in our High Court of Justice, Common Pleas Division, at Toronto, as ancillary to a writ of *habeas corpus*, bearing even date herewith."

It was agreed that it was unnecessary to consider the propriety of the condition imposed by the learned Chief Justice, unless we could interfere with the order of Mr. Justice Armour.

Mr. Bell urged that the evidence did not warrant the imposition of any condition. On that point we expressed our opinion as against the appellant.

He urged further that the Parliament of Canada had no jurisdiction to take away the right of bringing a civil action.

Mr. Aylesworth took the preliminary objection that the Divisional Court had no power to hear and determine an appeal from an order quashing the conviction.

*Regina v. Fee*, 13 O. R. 590, was cited against such contention.

A careful reading of the judgment in that case will, I think, shew that the point now raised for decision was not there decided; and, if it were, we are bound, I think, to decide according to our convictions of the law in a criminal case.

The language of the learned Chancellor leaves the question quite open, as it seems to me, when we remember

that the motion was enlarged by Mr. Justice Ferguson into the full Court. The learned Chancellor said, at p. 592: "If there was jurisdiction to apply to a single Judge to quash the conviction there is jurisdiction in the full Court to reconsider his decision. If the single Judge had no jurisdiction then the whole proceeding was *coram non judice* so far as he was concerned, and the conviction remains in full force."

It is apparent that the learned Chancellor was not satisfied as to the jurisdiction of the Provincial Legislature to give to a single Judge the right to hear motions to quash convictions, as it has been assumed it did by 37 Vic. ch. 7, (O.), R. S. O. ch. 50, sec. 281. It did not, as I have pointed out, become necessary in that case to decide the power of the Legislature to give a right to the full Court to re-hear the decision of the single Judge.

By the British North America Act, sub-sec. 27, sec. 91, is given to the Parliament of Canada the exclusive jurisdiction to legislate concerning "the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters." And by sec. 92, sub-sec. 14, to the Provinces, concerning "the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

The Administration of Justice Act, above referred to, did not in express terms profess to deal with criminal procedure; but by its general language did direct that all matters, which would include criminal matters, that "according to the law or practice prevailing before the 24th day of March, 1874, had been heard in the Court of Queen's Bench or Common Pleas, before the full Court in Term, or in the Practice Court," should, "unless a Judge otherwise directs, be heard and disposed of in the first instance by a single Judge sitting under the 20th section of the Act respecting the Courts of Queen's Bench and Common Pleas" (R. S. O. ch. 39, sec. 20), which provided that "one Judge of each

of the said Courts shall sit in open Court every week as well in as out of Term, except during long vacation, and except during the period from the 24th day of December to the 6th day of January thereafter, both days inclusive, for the purpose of disposing of all Court business which may be transacted by a single Judge."

It may well be doubted whether that Act did confer upon a single Judge the power to hear and dispose of motions in criminal matters which theretofore were required to be made before the full Court, and whether the Act should not be confined strictly to civil proceedings.

1. Because while it was within the power of the Provincial Legislature to constitute, maintain, and organize a Provincial Court of Criminal Jurisdiction, the section in question did not profess to constitute a single Judge such a Court, but merely provided that all matters which theretofore had been heard before the full Court should be heard and disposed of in the first instance by a single Judge. And sub-sec. 2 further provided that "every rule, order, or decision granted, made, or pronounced by such single Judge shall be subject to be reversed and reheard by the full Court;" and permitted a Judge to direct that the motion be heard and disposed of by the full Court in the first instance.

And 2. Because, if it did profess by such section to constitute a Judge a Court of Criminal Jurisdiction, it, by the same section, gave a right of appeal from such Judge, which it had not power to do, whether such right of appeal be or be not considered a new right or merely procedure. In either view the British North America Act reserved to the Parliament of Canada the right to legislate concerning "the criminal law" and "procedure in criminal matters."

It follows, therefore, that such Act, even if it did appoint a single Judge a Court of Criminal Jurisdiction, did not give a right of appeal, as such legislation was *ultra vires* the Provincial Legislature.

Prior to such Act motions to quash convictions had always been made to the full Court.



By 46 Vic. ch. 10, sec. 2, (D.), R. S. C. ch. 174, sec. 270 :  
“The practice and procedure in all criminal causes and matters, whatsoever, in the said High Court of Justice shall be the same as the practice and procedure in similar causes and matters before the establishment of the said High Court.”

The Judicature Act in express terms, as pointed out by Osler, J. A., in *Regina v. Eli*, 13 A. R., 526, negatives any intention to deal with either practice or procedure in criminal matters ; so that no question arises as to assumed authority under the provisions of that Act.

The effect is, that motions to quash convictions must be made to the Court ; and that no appeal lies from any rule, order, or decision made on such motion.

If the motion can properly be made to a Judge sitting alone his decision cannot be reviewed by the Divisional Court or by the Court of Appeal. For the latter proposition see *Regina v. Eli*, *supra*. If it should be made to the Divisional Court it of course follows that it is final.

This latter question was not argued before us, and as to it we express no opinion ; nor does it become necessary to say anything as to the power to impose the conditions above set out. If there was no power they will not stand in the way of an action. The result is, that if the single Judge had power to hear the motion his decision is final, and not appealable. If he had no power to hear it, then his action was of no avail, and still unappealable.

The appeals must be quashed, with costs.

*Appeals quashed.*

CAMERON, C. J., was not present through illness(a), and GALT, J., concurred.

(a) ROSE, J., stated to the reporter that he was authorized by the learned Chief Justice to say that he concurred in the result, and as he did not wish the judgment to be delayed on account of his illness, he would subsequently hand over his reasons. This, his death, on the evening of the day that judgment was delivered, unfortunately prevented.—REP.

## [CHANCERY DIVISION.]

## RE HAGUE—TRADERS' BANK v. MURRAY.

*Husband and wife—Dower—Building mortgage—Loan on progress certificates—Dower out of equity of redemption—42 Vic. ch. 22 sec. 1 (O.)—Costs.*

W. H. in 1883 made a mortgage of vacant land to a loan company, purporting to be a security for an advance of \$6000, but with an agreement of even date that, the purpose of the loan being to enable W. H. to erect a house on the land, the mortgage money should be advanced only on architect's certificates of the progress of the building. M. A. H., wife of W. H., joined in this mortgage for the purpose of barring her dower only. The house was built and the mortgage moneys went into the building as agreed. In 1886 W. H. died, and in the course of the administration of his estate real and personal by the Court this land was sold.

*Held*, reversing the decision of the Master in Ordinary, that M. A. H. was entitled to dower in the full value of the land out of the balance of purchase money remaining after the payment off of the mortgage, and this on the authority of *Re Robertson, Robertson v. Robertson*, 24 Gr. 442, 25 Gr. 276, 486, and by virtue of 42 Vic. ch. 22, sec. 1 (O).

Whatever may be the full meaning of 42 Vic. ch. 22 sec. 1 (O.), it cannot be held to have the effect of making the rights of a doweress less than they were held to be in *Re Robertson, Robertson v. Robertson, supra*.

*Held*, also, that the bank, the respondents to this appeal, being the parties having the carriage of the proceedings in the Master's office and supporting the judgment of the Master for the general benefit of the creditors, of whom they were one, should be reimbursed the costs of the appellant out of the estate, but not so as to prejudice the rights of the appellant.

THIS was an appeal by Mary Ann Hague, the widow of William Hague, from the certificate of the Master in Ordinary in respect of a ruling on a question arising in the administration by the Court of the estate, real and personal, of the late William Hague, who died on March 10th, 1886.

The question raised by the appeal, concisely stated, was, whether Mary Ann Hague was entitled to dower in the full value of certain lands, or only in the value of the equity of redemption, after discharging a mortgage thereon. Prior to June 25th, 1883, the land was unbuilt upon, and William Hague was the owner of it in fee simple absolute. On June 25th, 1883, he executed the mortgage in question, in which Mary Ann Hague joined to bar her dower. The

mortgage purported to be given in consideration of and to secure an advance of \$6,000 ; the evidence, however, shewed that the advance was not made at the time of its execution, but that the loan being intended to enable William Hague to erect a house on the land, the money was advanced upon an architect's certificates as the building progressed, in accordance with the provisions of a written agreement of even date with the mortgage, made between William Hague and the mortgagees.

The property was sold in the course of the administration proceedings for \$11,000, out of which the mortgage debt had to be paid.

It appeared in the administration proceedings that the estate was insolvent, and this was stated in the argument by counsel for the respondents.

The Master certified as follows :

" September 19th, 1887. I certify that in proceeding to hear and determine on the claim of Mary Ann Hague, widow of the above named ~~William~~ William Hague, to dower in the lands of her late husband, I ruled that she was entitled to dower in such lands subject to such mortgages thereon as had been given for the balance of the purchase money of such lands. And as to a certain property of the late William Hague at the corner of Queen and Berkeley streets in the city of Toronto, I found that a certain mortgage thereon to the Omnium Security Company was made by the said late William Hague to procure money for the erection of a brick building thereon, and that the proceeds of the said mortgage were applied to that purpose, and I thereupon ruled, on the 10th day of June last, that the claim of the said Mary Ann Hague was subject to the said mortgage in the same manner as her claim was subject to mortgages for the balance of the purchase moneys of the said lands."

The appeal came up for argument on September 20th, 1887, before Ferguson, J.

*J. Reeve*, for Mary Anne Hague, the appellant. We say the appellant should be allowed dower out of the whole \$11,000, for which the plaintiff sold. We contend the evidence did not establish as a fact that the \$6,000 went into the buildings, and secondly, that the Master is wrong on the law. As soon as the mortgage was paid, the object of the wife barring her dower, was satisfied. The cases which led finally

to the passing of the Dower Act of 1879, 42 Vic. ch. 22 (O.), were *Sheppard v. Sheppard*, 14 Gr. 174; *Thorpe v. Richards*, 15 Gr. 403; *White v. Bastedo*, 15 Gr. 546; and *Re Robertson, Robertson v. Robertson*, 24 Gr. 442, 25 Gr. 276, 486, which, as I understand it, is the foundation of the subsequent Dower Act of 1879. Then there is the case of *Martindale v. Clarkson*, 6 A. R. 1, subsequent to the Dower Act. I refer also to the case of *Re McMorris*, 8 C. L. J. N. S. 284; *Re Hopkins, Barnes v. Hopkins*, 8 P. R. 160; *Cameron on Dower*, pp. 232, 235, 272; *Smith v. Norton*, 7 L. J. N. S. 263, may also be cited, shewing the moment the seisin becomes complete, the wife's claim attaches, and is superior to any further claim which may arise. Reading section 1 of the Dower Act of 1879, and the interpretation placed upon it in *Martindale v. Clarkson*, 6 A. R. 1, it is clear the Master was wrong. By joining in the mortgage, Mary Ann Hague risked her interest in the land to the extent of that mortgage; if the whole of the land had been taken to pay off the mortgage, her interest would have gone; but if after the mortgage is paid off there is still a surplus, her interest revives just as it was before the mortgage. The husband could not make improvements on the land without increasing the value of the wife's dower. As to the question of fact, it was necessary to shew that the actual \$6,000 went into the buildings, and the evidence does not shew this. [FERGUSON, J.—The benefit of the mortgage money went into the buildings. Surely this is the real point, and not the identity of the moneys?] Seeking to defeat an established right they should be held in the strictest way to prove their point.

*Moss, Q. C.*, and *A. H. F. Lefroy*, for the Traders' Bank, creditors of the estate, who had the carriage of the proceedings in the Master's office, and as such represented the creditors generally. We submit that as against creditors, the widow can only get dower in the value of the equity of redemption. If she gets what is contended for, she gets her dower twice; once because she gets the increased value created by the mortgage first, then, if after paying off the



mortgage, she gets her dower out of the full value from the equity of redemption, she then gets it a second time. We refer to *Re McMorris*, 8 C. L. J. N. S. 284, and which is referred to with favour by Spragge, C., in *Doan v. Davis*, 23 Gr. 207. In two cases before Mowat, V. C., the widow claimed out of the assets of the intestate to be paid the value of her dower as a whole, and in both of these, there being no surplus in the mortgage premises, the Vice-Chancellor refused as against creditors to recognize her right: *White v. Bastedo*, 15 Gr. 546; *Baker v. Dawbarn*, 19 Gr. 113. In *Re Robertson*, Spragge, C., had not his attention called to R. S. O., ch. 107, sec. 30. There is no lien by virtue of suretyship. As a surety the widow could not take any preference or priority. Yet the appellant contends she is entitled to preference or priority. She has parted with her dower. *Chamberlen v. Clark*, 1 O. R. 135, shews how strictly this section is applied, and this was affirmed in the Court of Appeal (9 A. R. 273). In *Re McMorris*, 8 C. L. J. N. S. 284, the present Chancellor seems to have viewed the thing in all its aspects, and he had good warrant for what he says there, for it is plain that when *Re McMorris* was decided the law was against the right of the widow to any dower except out of the equity of redemption. In *Sheppard v. Sheppard*, 14 Gr. 174, VanKoughnet, C., certainly went the length of laying it down that, even as against creditors, the widow would be entitled to have her dower out of the full value. But in the next case which came before him, *Thorpe v. Richards*, 15 Gr. 403, he says he is not sure that he did not go too far in *Sheppard v. Sheppard*. In this state of the decisions, in *White v. Bastedo*, 15 Gr. 546, the matter again came up as between the wife and the creditors, before Mowat, V. C., who came to the conclusion the widow could not claim the full value as against the simple contract creditors. Then in *Baker v. Dawbarn*, 19 Gr. 113, Mowat, V. C., had again to consider the question as between the widow and creditors. There his decision was as before. She cannot, he holds, call on the estate to exonerate the

property from the mortgage, that she may get her full value as though the mortgage had never been on it. This was the position when the present Chancellor decided *Re McMorris*. As against the creditors, he regards it as clear she had not such a right as she claims here. In *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218, the English Courts repudiate the theory of the wife's right as a surety. When *Re Robertson, Robertson v. Robertson, supra*, came up, the decision was not a unanimous one of the three Judges, and so the law cannot be said to be in a very settled condition. The appellant argued that *Re Robertson, Robertson v. Robertson*, was confirmed by 42 Vic. ch. 22, but whatever the intention it seems clear in the opinion of the profession that it did not carry out any such object. Sec. 1 did not advance the law one step. In *Martindale v. Clarkson*, 6 A. R. 1, the Judges do not express any opinion of the effect of sec. 1, they only decide that it only applies to mortgages made after its passing. See *Smart v. Sorenson*, 9 O. R. 640; *Calvert v. Black*, 8 P. R. 255.

*Reeve*, in reply. The question comes back to this, is the point decided by *Re Robertson*? I submit that it is. Then sec. 1 of Act of 1879, under a fair interpretation affirms *Re Robertson*.

R. S. O. ch. 55, sec. 28, and R. S. O. ch. 126, sec. 3, were also referred to on the argument.

September 30th, 1887. FERGUSON, J.—This is an appeal by Mary Ann Hague, the widow of the late Wm. Hague, from the report of the Master-in-Ordinary. The matter is one of administration of the estate of the late Mr. Hague. It is admitted that there will be a deficiency of assets for the payment of debts, and the contest is virtually between the widow and the creditors. She claims to have the value of her dower out of certain lands computed or estimated upon the whole value of the lands, and the creditors contend that this computation or estimate should be made upon the value of the equity of redemption only. The learned Master has decided in favor of the contention of

the creditors, and has allowed the widow the value of her dower out of the equity of redemption, and not out of the whole value of the estate, and from this decision her appeal is.

The circumstances shortly stated are as follow : The late Mr. Hague was the owner of a lot or parcel of land, and had been the owner of it for many years before the time of the making of the mortgage upon it, which will hereafter be mentioned. In the year 1883 he became desirous of building upon the land, and for the purpose of building applied to and secured from the Omnium Securities Company a loan of \$6,000. This was secured by a mortgage upon the land, in which Mrs. Hague joined in the usual way—barring her dower. The buildings were erected upon the land. They cost more than \$6,000, and I think the Master's finding that the \$6,000 was employed in the erection of these buildings is supported by sufficient evidence, and should not be disturbed. The land, with the buildings upon them, have been sold for about \$11,000, leaving a balance (speaking in round numbers) of \$5,000, after satisfying the mortgage debt. The mortgage contained a covenant on the part of the mortgagor (Mr. Hague) to pay the mortgage debt, &c. There was an agreement between the mortgagor and mortgagees, bearing the same date as the mortgage, which was referred to on the argument of the appeal. This has relation to the construction of the buildings, the payment by the mortgagor of all mechanics' liens, &c. I do not consider it of any importance here beyond this, that it was a piece of evidence tending, perhaps, to shew that the loan had been employed in erecting the buildings.

As stated at the Bar, the learned Master in arriving at his conclusion considered that the loan of \$6,000 having been obtained for the purpose of, and applied as it was in the erection of the buildings on the lands, thereby so materially increasing the value of the land, should be treated as if it were parcel of the purchase money upon a purchase by Mr. Hague, of the land. In this I cannot agree with the learned Master, that is, assuming that such

was the basis, or one of the bases of his conclusion. I think that any rule that may exist in such cases should not be extended, and should not have been made to apply to the present case, which, notwithstanding the able and ingenious argument of Mr. Moss upon the subject, I think a very different case.

Apart from this consideration, the matter of the appeal was argued at much length, and in a searching manner in favour of the respondents. Counsel for the appellant, though referring to many authorities, relied mainly upon *Re Robertson*, *Robertson v. Robertson*, 24 Gr. 442, and 25 Gr. 276, 486, and the statute 42 Vic. ch. 22, sec. 1, (O.)

Since the argument I have examined the various authorities that were referred to by counsel, and considered the matter as best I have been able, and I am now of the opinion that the case *Re Robertson*, *Robertson v. Robertson*, is in point, and is binding upon me. I do not think that I can do any material good by writing at any length upon a subject that has been so much discussed, and upon which so much has already been written. Assuming then that *Re Robertson*, *Robertson v. Robertson*, is in point, in favor of the appellant, has the Act above mentioned made any difference against her contention here? The Act was passed after the decision in that case, and as was stated at the bar, there has been no decision under this section of it, which is as follows: "No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage, or other security upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument."

Whatever may be the full meaning of the section it seems clear to me that it cannot be held to have the effect of making the rights of a dowress less than they were held to be in the case of *Re Robertson*, *Robertson v. Robertson*, above, in such a case as that one was. Being, as I have said, of the opinion that that case is in point here, I



follow it, and state my conclusion to be that the dower of the appellant should have been estimated and computed, as in that case, upon the whole value of the land and not upon the value of the equity of redemption. So the appeal will be allowed, and I think with costs. The respondent, however, having the carriage of the proceedings, and supporting the judgment of the learned Master, for the general benefit of the creditors, should be reimbursed these costs out of the estate, but not so as to affect the rights of the appellant. If the trustee, Mr. Murray, was regularly made a respondent, he may have his costs out of the estate.

A. H. F. L.

---

## [QUEEN'S BENCH DIVISION.]

## REGINA V. WRIGHT.

*Ontario Medical Act, R. S. O. ch. 142—Unlawfully practising medicine—Costs of conveying to gaol—Conviction quashed—Costs.*

*Held*, that a Justice of the Peace, on a conviction under secs. 40 and 46 of ch. 142 R. S. O., intituled an Act respecting the profession of medicine and surgery, had no jurisdiction, on default by the defendant of payment of fine and costs, to direct his confinement for the space of one month, unless, in addition to the payment of the fine and costs, he paid the charges of conveying him to jail.

*Holman* obtained an order *nisi* to quash the conviction in this case upon the grounds that there was no evidence before the Justice of the Peace, who made it, to shew that the said Charles Wright unlawfully practised medicine or surgery for gain or hope of reward as alleged in the said conviction: that neither the conviction nor the evidence shewed where the alleged offence was committed: that the conviction did not shew the time when the offence was committed, and that the said justice had no jurisdiction to adjudge that the said Charles Wright should be imprisoned for the space of one month, unless the said sums and the costs and charges of conveying the said Charles Wright to jail should be sooner paid.

The conviction was as follows:

“ Province of Ontario, }  
County of Simcoe. }

“ Be it remembered that on the first day of June, in the year of our Lord 1887, at Collingwood, in the said county of Simcoe, Charles Wright is convicted before the undersigned, one of Her Majesty's Justices of the Peace for the said county, for that he, the said Charles Wright, being a person not duly registered under the provisions of the Ontario Medical Act, Revised Statutes of Ontario, chapter 142, did unlawfully practise medicine and surgery for gain or hope of reward, contrary to the provisions of the said Act, and I adjudge the said Charles Wright, for his said offence, to forfeit and pay the sum of twenty-five dollars,

to be paid and applied according to law, and also to pay Josiah Roseborough, the complainant, the sum of three dollars and ninety-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, I adjudge the said Charles Wright to be imprisoned in the said county, at Barrie, in the said county of Simcoe, and there to be kept for the space of one month, unless the said sums and the costs and charges of conveying the said Charles Wright to the said common jail shall be sooner paid.

Given under my hand and seal the day and year first above mentioned, at Collingwood, in the county aforesaid.

JOHN NETTLETON."

It appeared from the evidence that the said Wright was a practising chemist at Collingwood, and was called in to see Josiah Roseborough, the complainant, when ill.

It was contended by the defendant that he did not assume to act as a physician with hope of reward, but that he simply acted as nurse, and charged only for his care and medicine.

*Osler, Q. C., contra.*

November 22, 1887. ROSE, J.—I am unable to interfere on the evidence, as I think there was evidence on which the magistrate might find as he did. I probably should have come to a similar conclusion, although that is not material.

I am, however, unable to uphold the conviction against the objection that it directs, *inter alia*, the defendant to be imprisoned until the costs and charges of the commitment and conveying him to prison be paid.

The conviction is under the 40th and 46th secs. of ch. 142 R. S. O., which enable the justice to award payment of costs in addition to the penalty, and in case the penalty and costs so awarded are not paid forthwith upon conviction, then to commit the offender to the common gaol, there to be imprisoned for any term not exceeding one month, unless the penalty and costs be sooner paid. The Act makes no provision for the costs or charges of commitment or conveying to gaol.

Mr. Osler relied upon sec. 98 of the Summary Conviction Act, ch. 178 R. S. C., in accordance with which, under sec. 47 of ch. 142, the prosecution took place.

Sec. 98 provides that "Whenever any person is imprisoned for non-payment of any penalty or other sum, he may pay, or caused to be paid to the keeper of the prison in which he is imprisoned, the sum in the warrant of commitment mentioned, together with the amount of the costs and charges and expenses therein also mentioned, and the keeper shall return the same, and shall thereupon discharge the person, if he is in his custody for no other matter."

I cannot see how this section gives the magistrate any power to direct payment of any costs, charges, or expenses he is not by law entitled to award against the person charged.

Secs. 62 to 67 of the same Act were referred to, but I think they do not apply.

Sec. 62 only applies where the Act authorizing the conviction provides for the levying the same by distress, and where by the Act no mode of raising or levying the penalty, compensation, or sum of money, or of enforcing the payment of the same, is stated or provided. The Act, ch. 142, does not provide for levying by distress, and it does provide for enforcing the payment by imprisonment for one month.

Secs. 63, 64, 65, 66, and 67, only apply to cases covered by sec. 62.

It may be noted that sec. 66, if it apply, requires that the amount of the costs and charges of commitment and conveying to gaol shall be ascertained and stated in the commitment. This is not done in the commitment in question.

Mr. Osler further urged that under sec. 87 the objection was not entitled to prevail, it appearing that an offence in the nature of that described in the commitment had been committed; but I am unable to give effect to this contention, as that section cannot be invoked if the punishment imposed is in excess of that which might have been lawfully imposed for the said offence, as is here the case.



It was urged that as a penalty of \$100 and costs could have been imposed, and as the sums awarded, including the costs and charges of commitment and conveying to jail, did not exceed such sum, the section did apply.

I cannot think that to have been the meaning of the Act, for if so then the magistrate might have inflicted only a nominal fine, and then have awarded extortionate and unlawful costs and charges, and the conviction and commitment could not have been objected to.

The conviction must be quashed ; but, as the merits are against the defendant, without costs, and the usual order for protection will be granted.

As to excess of jurisdiction the cases of *Regina v. Lynch*, 12 O. R., p. 372, and *Regina v. Elliott*, 12 O. R. 524, may be referred to.

*Judgment accordingly.*

---

## [QUEEN'S BENCH DIVISION.]

## REGINA V. DURNION.

*Canada Temperance Act 1878—Canada Temperance Act R. S. C. ch. 106—  
Information before two justices—Summons signed by one—R. S. C. ch.  
178, sec. 28—49 Vict. ch. 4, sec. 7 (D).*

A summons under the Canada Temperance Act 1878 recited the information, which was taken by two justices, to have been "laid before the undersigned," who was one of the justices only, and required the defendant to appear before him, or before the justices who should be at the time and place named to hear the complaint. The information and conviction were drawn up for an offence against the Canada Temperance Act, 1878, while the Revised Statutes of Canada were in force before and at the time the information and proceedings thereon were had. An offence was proved to have been committed both before and after the Revised Statutes came into force.

*Held*, that the name of the justice who was not a party to the summons need not be stated in it. *Regina v. Ramsay*, 11 O. R. 210, not followed on this point.

*Held*, also, that although the summons did not conform to the facts, yet, as the two justices who took the information were both present at the hearing, and the defendant was convicted on the merits, the objection to the summons was not entitled to prevail under R. S. C. ch. 178, sec. 28.

*Held*, lastly, that the charge as laid and proved must be treated as if under the original Act, which by 49 Vic. ch. 4, sec. 7 (D.) was not absolutely repealed so as to affect any penalty, &c., incurred before the time of such repeal.

*Hall* obtained an order *nisi* calling upon George McKay and Myles Young, two Justices of the Peace in and for the county of Huron, and one William Paisley, to show cause why the conviction of the defendant, of the 22nd of August last, should not be quashed, with costs to be paid by the said Justices and the said Paisley to the defendant, on the following, amongst other, grounds:

1. That the second part of The Canada Temperance Act, 1878, was not in force in the county of Huron when the conviction was made.

2. That the Justices had no jurisdiction to try the matter of the information or complaint, as the summons to the defendant and the summons to the witness, served on the defendant, showed the information or complaint was made before one Justice of the Peace only.

3. That the summons to the defendant did not, nor did the summons to the witness, name the Justice of the Peace before whom, along with the said George McKay, the said matter was to be tried, and no Justice except one so named had any jurisdiction to determine the matter of the information or complaint under the statute.

The information was laid by William J. Paisley, License Inspector, on the 14th of April, 1887, before the undersigned, two of Her Majesty's Justices of the Peace, in and for the county of Huron, "for that Robert Durnion, at the village of Blyth, in the county of Huron, between, the 20th of February and the 9th of April, 1887, unlawfully did sell intoxicating liquor, contrary to the provisions of the second part of the Canada Temperance Act, 1878, then in force in said county.

(Signed) W. J. PAISLEY,  
*Inspector."*

"Sworn before me the day and year first mentioned at the village of Blyth, in said county of Huron.

(Signed) GEORGE MCKAY, J.P.  
M. YOUNG, J.P."

The summons was issued and signed by McKay alone, one of the Justices. It recited the complaint to have been made before him, not naming the other Justice; that the sale of liquor was between the 20th of February and the 9th of April, 1887, contrary to the provisions of the second part of the Canada Temperance Act, 1878, then in force in the said county. The defendant was required to appear on the 22nd April, 1887, at 9 a. m., at, &c., "before me or such Justice of the Peace for the said county as may be there to answer to the said complaint. Given under my hand and seal at and in the said county, this 16th April, 1887.

GEORGE MCKAY."

The information and conviction were drawn up for an offence against "The Canada Temperance Act, 1878," while the Revised Statutes of Canada were in force before

and at the time the information and proceedings thereon were had.

*Hall* supported the order *nisi*. The summons should have contained the name of the other Justice who was to hear the complaint, and who is a party to the taking of the information. The summons reads as if the complaint had been taken before George McKay alone. It requires the defendant to appear before McKay alone, which is erroneous, or before such Justices as may then be there, to answer to the said complaint, without naming the Justices he was to appear before.

Then, as to the title of the Act of 1878. The 49 Vic., ch. 4, at the beginning of the 1st volume of the R. S. C., intituled "An Act respecting the Revised Statutes of Canada," sec. 5, sub-sec. 2, says, that "On, from and after such day," [when the Revised Statutes of Canada are to come into force by proclamation] "all the enactments \* \* in such amended schedule A mentioned shall, so far as the same are within the legislative authority of the Parliament of Canada, stand and be repealed to the extent mentioned in the third column of the said schedule A;" and the schedule A referred to is at the end of the 2nd volume of the Statutes of Canada, and page one of that schedule states the "Acts and parts of Acts repealed from the date of the coming into force of the Revised Statutes of Canada, so far as the said Acts and parts of Acts relate to matters within the legislative authority of the Parliament of Canada;" and at page 43 of the Schedule, The Canada Temperance Act, 1878, is referred to as follows :

CHAP.	TITLE OF ACT.	EXTENT OF REPEAL.
'	'	'
'	'	'
16	An Act respecting the traffic in Intoxicating Liquor.	The whole except sec. 124.

*Delamere*, contra. The information was before two justices, and the summons was issued and signed by one, as it might be: 32-33 Vic. ch. 31, (D.), sec. 107, now the



R. S. C. ch. 178, sec. 6, and *Regina v. Klemp*, 10 O. R. 143. As to the Canada Temperance Act, 1878, being in force he referred to the 49 Vic. ch. 4, sec. 7, sub-sec. 3; and also to sec. 8, and to sub-sec. 2 at the beginning of the 1st vol. of the R. S. C.; also to ch. 1, sec. 7, sub-sec. 49, and sub-secs. 50, 51, the Interpretation Act of R. S. C.

*Hall*, in reply, referred to *Regina v. Johnson*, 13 O. R. 1, following *Regina v. Ramsay*, 11 O. R. 210, and not following *Regina v. Klemp*, 10 O. R. 143.

September 27, 1887. WILSON, C. J.—The information was laid before the two Justices: there is no exception therefore to it. The summons by the express words of section 105, of The Canada Temperance Act, 1878, and the Revised Statutes of Canada, ch. 106, sec. 105, is sufficient if signed by one of them. In *Regina v. Klemp*, 10 O. R. 143, I decided that one Justice could take the information as well as issue the summons.

In *Regina v. Ramsay*, 11 O. R. 210, Mr. Justice Galt decided that "it is imperative the information under section 105 must be laid before two Justices of the Peace, and that the summons should be signed by one of them, and they must both be named in the summons because it is by those two only the case can be tried (except as mentioned in the statute.) It is not in my opinion sufficient for the parties issuing the summons to state that the case will be tried before himself and another named Justice, because unless the information had been laid before them both, the latter would have no jurisdiction. In the case before me, for all that appears, the information was laid before Mr. King only, and if so his naming Mr. Bird as his associate, before whom the case would be tried, would not enable the latter to sit; they have therefore no jurisdiction."

Mr. Justice O'Connor has, in *Regina v. Johnson*, 13 O. R. 1, affirmed my brother Galt's decision.

The summons in this case is signed by George McKay, only, one of the two Justices who took the information, and it states the complaint to have been made before him,

while it was made before the two, and it requires the defendant to appear before him, *or before the Justices who shall be at the time and place named to hear the complaint.*

Section 105, R. S. C. ch. 106, is as follows: "If such prosecution is brought before any two other Justices of the Peace [that is, *other* than a Police Magistrate, &c.] the summons shall be signed by at least one of them, and no Justice other than *such* two Justices shall sit or take part therein except in the case of their absence, or the absence of one of them, and not in the latter case except with the assent of the other of them." If the words "such prosecution," and the same words in section 103, are held to relate to the initiation of the proceedings, that is, the laying of the information, there is much force in the argument of Mr. Justice Galt, in the case referred to, in the mode of construing the statute, as it would be apparent then that the only Justices who were to hear the matter [except in the case of their absence as provided for] were the two who took the preliminary proceedings, and that such fact should therefore be expressed both in the information and in the summons.

The words, "If such prosecution is brought before any two other Justices of the Peace the summons shall be signed by at least one of them," do seem to refer to some proceeding antecedent to the summons, and that must be the information or complaint; and the further words "and no Justice other than *such* two Justices shall sit or take part therein," &c., make it appear more strongly that *such* Justices have by some joint participation become and been interested in, and taken control of the case.

It is then provided, "the summons shall be signed by at least one of them." If so, the summons should correctly recite the fact of the information having been laid before the two, and either name the two, or at least it should have stated, "before me the undersigned Justice and another Justice of the Peace." The summons in this case recites the information to have been "laid before the under-

signed," the undersigned being George McKay only ; and it requires the defendant to appear " before me, or such Justices of the Peace for the said county of Huron as may then be there to answer to the said complaint."

It is contended, on behalf of the defendant, the summons is void because the name of the other justice who joined in the taking of the information has not been stated in the summons as having taken the information, and as being one of the justices before whom the defendant was required to appear.

I do not think the name of the justice who is not a party to the summons is required to be stated in it.

If the summons had been, "that complaint had been made before the undersigned, one of Her Majesty's Justices of the Peace in and for the county of Huron, and also before another Justice of the Peace in and for the said county, for that," &c., that would in my opinion have been sufficient ; for the purpose of the enactment is, as the section states, " that no other than such two justices shall sit or take part therein except in the case of their absence, or the absence of one of them, and not in the latter case except with the assent of the other of them." That was enacted so as to exclude other justices from intervening or interfering with the prosecution before those justices who had been selected by the complainant, and outvoting, over-ruling or obstructing them in their duty, as frequently happened by the defendant getting justices friendly to him to attend for that purpose, or at any rate to see after his rights, which sometimes meant the same thing.

The object was not to serve, inform, or benefit the defendant, but to protect the complainant, and to preserve exclusive jurisdiction to the justices who had been complained to. In this case McKay and Young received the information or complaint, and became seised of the case, and they were the two justices who attended to hear it, and before whom the defendant appeared, and against whom he objected, by his counsel, that " the Court as constituted had no jurisdiction." He did not

state more particularly what the nature of the objection was. The defendant's counsel most likely was relying on the decision of Mr. Justice Galt in 11 O. R. 210, that unless the names of the two justices who were to hear the case were named in the summons, as well as in the information, they had no jurisdiction. I do not agree that the names of the two justices *must* appear in the summons, although the two justices, I think, must take the information and be the two justices who try the case, subject to their or either of them being excused in the event of their absence, or the absence of either of them.

What difference does the naming or not naming of the Justices in the summons make to the defendant? The one not named does not in my opinion either get jurisdiction by naming him or lose jurisdiction by not naming him. He may not happen to be present at the hearing, and then the one present assents to, chooses in fact a second justice, of whom the defendant had no previous knowledge or information, to act in place of the one who is absent. The statute does not in terms require the two justices to be named in the summons, and more formality should not be required than is absolutely necessary.

All that can be said is that the summons should conform to the facts, and as it was not in this case conformable to the facts, as before stated, it was not quite correct in form.

The summons should no doubt have required the defendant to appear before the justices who took the information, or before the justice who issued the summons, and such other justice as should then be present to hear the case, and that, I think, would in form have been sufficient.

I cannot say the two justices who received the complaint and signed it, and who were both present at the hearing, were not a court as constituted, and had therefore no jurisdiction because of the objections made to the summons.

It will be observed that section 107 makes the Summary Convictions Act a part of The Temperance Act, "so far



as no provision is hereby made for any matter or thing which is required to be done with respect to such prosecution ;" and The Temperance Act does not clearly provide anything about the taking of the information by two justices, nor anything about the two justices being named in the summons ; and the general law (R. S. C. ch. 178, sec. 6,) is that one justice may receive the information and issue the summons, and do all other acts and matters necessary *preliminary to the hearing*, even if it is provided the information shall be heard and determined by two justices. That has been the law in England since the 3 Geo. IV. ch. 23, sec. 2, and in this Province ever since the 2 Wm. IV. ch. 2, sec. 2, and see *Queen v. Russell*, 13 Q. B. 237. I am, however, of opinion the information should be before the two justices.

The Canada Temperance Act provides also (R. S. C. ch. 106, sec. 117) that "No conviction \* \* shall be held insufficient or invalid \* \* by reason of any other defect in form or substance, if it can be understood from such conviction that the same was made for an offence against such provision of such Act within the jurisdiction of the justices \* \* who made or signed the same ; and if there is evidence to prove such offence, and if no greater penalty is imposed than is authorized by such Act."

Section 118 gives power to try the merits on a motion to quash the conviction, and may amend the same if necessary. See also R. S. C. ch. 178, sec. 87, to the same effect.

Then, by R. S. C. ch. 106, sec. 119, no conviction under the second part of the Act shall be removed by *certiorari*, or otherwise, into any of the Courts of record. That will only enable matters on which the conviction is void for want of jurisdiction.

Upon the merits the defendant was rightly convicted. There was evidence to prove the offence, and no greater penalty has been imposed than is authorized.

By the R. S. C. ch. 178, sec. 28, no objection shall be allowed to any information, complaint, summons, or war-

rant, in substance or form; and by sub-sec. 4, if the defendant has been misled thereby the justices upon term adjourn the hearing to a future day.

I shall not give effect to the exceptions taken to the summons.

In *Blake v. Beech*, 1 Ex. Div. 320, in Appeal, the information was laid under one Act, the conviction was made under another Act. No information was laid or summons issued under the last Act, and the party did not waive the omission. The conviction was quashed.

There are numerous other cases on the subject. Most of them will be found in *Crepps v. Durden*, 1 Sm. L. C. 8th ed., p. 730 *et seq.*

Then, as to the information, summons and conviction describing the offence as contrary to "The Canada Temperance Act, 1878," while the R. S. C. ch. 106, sec. 1, says the Act may be cited as "The Canada Temperance Act." That difference is of no consequence. But it is said the Canada Temperance Act, 1878, was wholly repealed, and the present enactment, R. C. S. ch. 106, came into force on the 1st of March, 1887, and the complaint was made on the 16th of April, 1887, of a breach of the statute between the 20th of February and the 9th of April, 1887.

One witness proves the sale of liquor to him by the defendant on the 4th of April, and a second witness said he got at defendant's place liquor between the 20th of February and the 9th of April.

The 49 Vic. ch. 4, sec. 7 (D.) declares the repeal of the said Acts shall not affect, sub-sec. (a), any *penalty*, &c.

Sub-sec 3 (b). "But every such *conviction*," &c., (sub-sec. f) "shall remain and continue as if no such repeal had taken place, and so far as necessary may and shall be continued, prosecuted, enforced and proceeded with under the said Revised Statutes and the other statutes and laws having force in Canada, and subject to the provisions of the Revised Statutes and laws, as if no such repeal had taken place."

By sec. 8, the Revised Statutes shall not be held to

operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted; also sub-sec 2 and the other sections referred to by Mr. Delamere.

The charge as laid and proved is therefore to be treated in effect as if it had been laid and proved under the original Act; for the repeal of the former Acts is not to affect proceedings under them, but such proceedings and matters are to remain as if no such repeal had taken place; and so far as necessary such matters are to be continued, prosecuted, enforced, and proceeded with under the Revised Statutes, and subject to the provisions of the several statutes, as if no repeal had taken place; for the Revised Statutes are not to operate as new laws, but are a mere substitution of the repealed Acts and to be construed as a mere consolidation, and as declaratory of the repealed Acts.

The repealed Acts have not been absolutely repealed and abolished, nor do the Revised Statutes take effect as new and independent enactments; but all matters are to be carried on under the Revised Statutes as if no repeal had taken place, for the Revised Statutes are not new laws, but a consolidation and declaratory of the law as contained in the former Acts.

Since writing my judgment my brother Rose, to whom I spoke of the case, has sent me the judgment lately delivered in the Common Pleas Division in *Regina v. Sproule*, (reported 14 O. R. 375), holding that it is not necessary the two parties should be named in the summons, in which judgment Mr. Justice Galt concurred.

I decide against the objection taken by the motion to this part of the case, and I dismiss the motion, with costs to be paid by the applicant.

*Motion dismissed, with costs.*

## [COMMON PLEAS DIVISION.]

## AYERS V. THE CORPORATION OF THE TOWN OF WINDSOR.

*Municipal corporations—Altering grade of street—Necessity for by-law—Negligence, evidence of—Action for damages.*

Action for damages sustained by the plaintiff by reason of the defendants lowering the grade of the street in front of her store. The property owners, but not including plaintiff, had petitioned the council for the block-paving of the street as a local improvement under section 612 of the Municipal Act of 1883. The matter was duly considered, and a by-law passed to ascertain the property to be benefited thereby, and the expense and amount of assessment; and subsequently a further by-law was passed for raising the money required therefor by loan, and for assessing the amount. It was deemed advisable to change the grade, and the street was lowered in front of the plaintiff's premises about four feet. No reference was made in the said by-laws as to any alteration in the grade, nor was any by-law passed therefor.

*Held*, that there was no negligence in the corporation by reason of the lowering of the grade, for the work was undertaken in the interests of the residents, and executed under the advice and direction of a presumably competent engineer, the learned Judge considering that he could not assume the discretion vested in the corporation of deciding as to the necessity of lowering the grade; but *Held*, that in order to justify the interference with the grade of the street a by-law therefor was necessary; and in the absence of such by-law the defendants were liable, by action, for the damage sustained.

THIS was an action tried before Rose, J., without a jury, at Windsor, at the Spring Assizes of 1886, when the learned Judge reserved his decision, and subsequently delivered the following judgment:

*Dougall*, for plaintiff.

*McHugh*, for defendant.

September 8, 1887. ROSE, J.—I reserved judgment in this case until the present, awaiting the result of the litigation in *West v. Corporation of Parkdale*, which has lately been decided by the Privy Council. Its history may be found in 7 O. R. 270; 8 O. R. 59; 12 A. R. 393, and 12 S. C. R. 250.

The present action is brought to recover damages for injury sustained in lowering the street in front of the plaintiff's store on Oulette avenue, in the town of Windsor.



The plaintiff rests her claim. 1. Upon the negligence of the corporation in unnecessarily lowering the grade. She alleges it was unnecessary to lower it at all; and, if necessary, it was carried to a greater depth than necessary.

2. That the corporation had no right or power to interfere with the grade of the street at all, the work not having been authorized or directed by by-law.

The work was undertaken as a local improvement under section 612 of the Municipal Act of 1883.

The Act of 1884 is referred to in the pleadings. The petition for the work was received, and the board of works recommended a plan and estimates being procured prior to the passing of that Act.

The petition sent in is without date. I find marked on the back the date of "June 4, 1883," and "Referred to the Board of Works with power to procure plans and estimates." It was signed by a number of the property holders, alleged to have been a majority in number, and representing two-thirds in value, and petitioned the Council "to take such steps as may be deemed expedient for the immediate paving with wood or block pavement," as might seem meet.

On the 11th of February, 1884, the Board reported, recommending the obtaining of a plan and estimates—saying that when they were received they would "be in a position to make a further recommendation, probably looking to the speedy completion of the pavement along the portion of the streets intersected."

This report was adopted.

Plans, &c., were prepared, and the work resolved upon, and proceeded with.

On the 28th of April, 1884, a by-law was passed reciting that the corporation had resolved to pave the avenue under the authority of section 612, and following sections of the Act of 1883, which by-law provided the means of ascertaining and determining what real property would be immediately benefited, and the expense and the proportions on which the assessment was to be made on the real

estate so benefited, as provided by sec. 612 of the Act of 1883.

On the 23rd of February, 1885, the corporation passed a by-law for the purpose of raising the money required, by loan, and for assessing the cost, &c.

In order to pave the street properly it was deemed best to change the grade, and the street was lowered in front of the plaintiff's premises about four feet, rendering her store less easy of access and of less value as a business stand. No reference is made in the by-laws as to any alteration in the grade of the street, paving alone being provided for.

I think I cannot find any negligence on the part of the defendant corporation. The work was undertaken in the interest of the residents upon the street, and executed under the advice and direction of a presumably competent engineer; and I cannot assume to myself the discretion vested in the corporation of saying whether it was best to lower the street or whether it was excavated to a greater or less depth than absolutely necessary or beneficial.

I have to determine whether or not the defendants can justify their interference with the street under the Municipal Acts, not having passed a by-law authorizing or directing the work to be done.

If so, then probably the plaintiff must proceed for compensation by reference under the Act, and not by way of action for damages.

I understand that the case of *West v. Corporation of Parkdale*, in the Privy Council, (a) rests upon the following principles:

1. That interfering without authority with the grade of a street or highway in front of a man's property, renders the party interfering liable to answer in an action for damages.

2. That a corporation, which by its Act of incorporation is authorized to interfere with the grade of streets or highways upon the performance of certain conditions, cannot

(a) Since reported in 12 App. Cas. 602.

justify such interference under such Act, if such conditions were not first performed.

3. That a direction by the railway committee to the railway companies to do work, the execution of which necessarily interfered with the grade of the streets traversed, did not give the corporation the right to do the work until they had complied with the conditions named in the Railway Acts.

If, therefore, it was necessary before doing the work in question to pass a by-law providing for such work, the defendants not having passed the by-law are liable in this action to answer in damages; and the plaintiff is not driven to proceedings by way of reference under the Municipal Act for compensation.

As is pointed out in *Croft v. Town Council of Peterborough*, 5 C. P. 35 and 141; *Reid v. Corporation of Hamilton*, 5 C. P. 269, there is no provision authorizing municipal corporations to do such work as that in question, but only a provision authorizing them to pass by-laws for such purpose.

In other words, municipal corporations are created legislative bodies with power to pass laws or ordinances, under the provisions of which certain works may be executed.

In the cases above referred to, the Court was of the opinion that if the corporation was compelled to resort for justification to the section authorizing it to pass by-laws for doing the work complained of, it could not justify without a by-law.

The learned Chancellor of Ontario, in the very recent case of *Pratt v. Corporation of Stratford*, 14 O. R. 260, has pointed out how the Courts have held that municipal corporations are justified in making repairs without a preliminary by-law, because they would be subject to be proceeded against by action or indictment for neglect.

I confess, in view of the decision of the Privy Council above referred to, I am unable to see clearly how this distinction exists; for, in accordance with the principle of such decision, it would seem that the requirement to keep the

streets, &c., in repair would be a requirement to do such work in the manner provided by the Act, namely, after passing a preliminary by-law.

Of course the difficulty presents itself as to whether it would be necessary to pass a by-law to provide for every trifling matter. This might be met by passing a general by-law providing for making repairs as they might be needed, and for the necessary funds.

The distinction has, however, been made; and the learned Chancellor felt bound to observe it, and so held in the case referred to, that the plaintiff could not recover damages in an action, but must claim compensation as provided for by the Municipal Act.

The work in question in this action was not such as the corporation could have been compelled to perform. So far as appears the street was not in such want of repair as would have rendered the corporation liable for damages or subject to an indictment. At the request of some of the residents—the plaintiff not being one of the petitioners—the corporation thought fit to do the work. It seems to me that there was no authority to do it save under section 550 of the Act of 1883; and, no by-law having been passed under that section, the defendant corporation cannot justify under it.

It may be observed that sub-sec. 9 of sec. 21, of the Act of 1884, provided that upon the receipt of a petition “the corporation may make the necessary assessment, pass the necessary by-law, and take all proper and necessary proceedings for the execution and completion of such work.”

The provisions of section 393 of the Municipal Act providing for compensation for real property injuriously affected are in express terms confined to work done under a by-law; and section 389 is confined to “cases where arbitration is directed by this Act.”

There was in the present case no by-law; and, for the reasons given, I think no arbitration was directed by the Act; and so the plaintiff is entitled to recover.

There was the usual difference of opinion as to the



amount of damages sustained, the witnesses varying from \$100 per annum to \$100 in all.

The best opinion I could form was that \$500 would be a fair assessment; and I so assess the amount.

My attention has been called to the fact that since the trial the buildings on the property have been consumed by fire. This, of course, cannot affect my judgment.

There will be judgment for the plaintiff for \$500, and full costs.

*Judgment for plaintiff.*

---

[COMMON PLEAS DIVISION.]

McDERMOTT ET AL. V. KEENAN ET AL.

SPECIAL CASE.

*Mortgage—Will—Appointment—Time of payment—Interest.*

A mortgage to secure \$800 on certain lands was made by T. K. to his father. The proviso for payment was that the \$800 was to be paid to the mortgagee's executors or administrators in eight equal annual instalments of \$100 each, the first payment to be made one year after the mortgagee's decease, upon trust to pay the same to such person or persons as the mortgagee should by deed endorse on the mortgage, or otherwise by deed direct and appoint; and in default of appointment to his children other than his son John, &c. No appointment was made by deed indorsed on the mortgage, or otherwise by deed. The mortgagee by his will directed that the \$800 should be payable, namely, \$200 to each of his three daughters A., M. and B., and \$100 each to his granddaughter K. and his widow, to be paid forthwith after his death.

*Held*, that the will constituted a valid appointment under the proviso in the mortgage, and that the legatees or appointees under it were entitled to the sums bequeathed to them; but that the time for the payment of the money must be in accordance with the terms of the mortgage.

The mortgage was on a printed statutory form, the proviso was for payment of the \$800, the printed words "with interest," being struck out; but the mortgagor covenanted to "pay the mortgage money and interest and observe the above proviso;" and there were the usual provisos as to distress for arrears of interest, principal becoming due on non-payment of interest, &c.

*Held*, that no interest was payable until after default in the payment of each instalment of principal as it became due.

The plaintiff, Bridget McDermott, was the administratrix with the will annexed of Thomas Keenan, deceased, and

was also an heir-at-law of the said Thomas Keenan, and a legatee or appointee under his will; and the other plaintiffs Ann Wood and Mary Cavan were legatees or appointees under the said last will and testament.

The defendant, F. E. Redick, was the assignee of all the right, title, and interest of Honora Keenan under the said will, she having assigned the same to her son, John Keenan, who assigned the same to the defendant; and the other defendant Agnes Keenan was an infant under twenty-one, and a grand-daughter of Thomas Keenan, and a legatee or appointee under the will.

Thomas Keenan, deceased, was mortgagee of the land mentioned. The mortgage was made on the 14th of December, 1867, by Thomas Keenan, the son of the mortgagee.

The proviso for payment was as follows:

“Provided this mortgage to be void on payment of the sum of \$800 of lawful money of Canada unto the executors or administrators of the said mortgagee in eight equal annual instalments of \$100 each; and the first of such instalments to be made one year after the decease of the said mortgagee, upon trust to and for such executors or administrators, to pay the same to such person or persons as the said mortgagee shall, by deed endorsed hereon, or otherwise by deed, direct and appoint; and, in default of any such appointment, and so far as no appointment shall extend, in trust, to pay the same to the children of the said mortgagee, other than the said mortgagor, in equal shares; and, in case of the death of any of the children without lawful issue, the proportion of such child to be equally divided amongst the survivors; and, in case of lawful issue, such issue to stand in the place of his or her parent.”

The mortgagee made no appointment by *deed* endorsed on the mortgage, nor otherwise by *deed*.

On the 18th of April, 1886, the mortgagee made his last will and testament, in which it was stated: “Understanding that the sum of \$800, accruing to my heirs and assignees from my estate, consisting of,” &c., “has not been specified as to which or whom of my heirs it is payable, or when it shall be paid, desire to direct that in this my last will and testament how it shall be disposed of.

To my daughter Ann Wood I bequeath \$200.

To my daughter Mary Cavan I bequeath \$200.

To my daughter Bridget McDermott I bequeath \$200.

To my grand-daughter Agnes Keenan I bequeath \$100.

To my wife Honora I bequeath \$100. I further direct that this shall be paid them, my heirs above-mentioned forthwith after my death."

The testator left five children, Bridget, Ann, Mary, John and Thomas.

The questions for the Court to decide were, whether the heirs at law of Thomas Keenan, other than his son Thomas Keenan, were entitled to the mortgage money; or whether the legatees or appointees under the will 'were entitled thereto.

On September 16th, 1887, the case was argued.

*F. S. Wallbridge*, for the plaintiffs.

*C. J. Holman*, for the defendant *F. E. Redick*.

*Hoskin*. Q. C., for the infant defendants.

September 27, 1887. WILSON, C. J.—The shares of the three daughters are not in question or dispute. They are within the terms of the proviso of the mortgage, and they are named in the will.

Thomas, the son, is expressly excluded by the proviso of the mortgage, he being the mortgagor, and he is not named in the will.

John, who is within the terms of the proviso, and who, under an appointment in the *very terms* of the proviso, or without an appointment, would have taken \$200, or one-fourth of the \$800, is not named in the will; but what would have been his portion is divided by the will, \$100 of it being given to Honora, the widow of the testator, and the other \$100 of it being given to Agnes Keenan, the granddaughter of the testator.

Honora, the widow, has assigned her \$100 under the will to her son John, and John has assigned that \$100, and all claims he may otherwise be entitled to under the proviso of the mortgage, to *F. E. Redick*.

The questions are—

1. Is John entitled, under the proviso of the mortgage, to the sum of \$200 in his own right? If so, Redick is entitled to receive it as the assignee of John, and Agnes Keenan, the grand-daughter, will be excluded.

2. If John is not entitled to receive the \$200 under the proviso of the mortgage, then Redick, as the assignee of John, who is the assignee of his mother Honora, is entitled to the \$100 given to Honora by the will. And Agnes Keenan, the grand-daughter, is entitled to the \$100 given to her by the will.

The will shews the testator made it for the purpose of stating the persons who were to take the \$800, and the share which each person was to take, as that was not mentioned in the proviso, and to state also the time when the payments were to be made, as such time had not been provided for.

The testator was mistaken in saying no time had been named for payment of the money. No time, it is true, is stated *expressly* in the proviso when the parties are to be paid, but it is plainly and impliedly provided for by the time being stated when the mortgagor is to pay it. And as that time named in the mortgage is at a wholly different time from that which is mentioned in the will—"forthwith after my decease"—the parties must wait until the time which has been allowed to the mortgagor by the proviso, which is in eight equal yearly instalments, the first payment to be made one year after the death of the mortgagee.

Whether John, the son, is entitled to the \$200, which he would have taken under the proviso of the mortgage, depends upon the question whether the will is a good appointment or not. If it is, John will not. If it is not, he will take.

The case of *Bruce v. Bruce*, L. R. 11 Eq. 371, shews a will is a good execution of a power which provides that it shall be executed by deed: *Sneed v. Sneed*, Ambl. 64.

If it be defectively executed, and it is necessary to amend it, I shall amend it.



That determines that Honora, the widow, and Agnes, the grand-daughter, are each entitled to the \$100 appointed to them. Agnes Keenan will take her share in her own right, and Redick will take, as assignee, the share of Honora, assigned to her son John, and by him assigned to Redick.

Another important question was also argued.

Is the mortgagor liable to pay interest or not?

The mortgage is in the statutory form. The proviso is for the payment of \$800. The printed words *with interest* are crossed out

The covenants are as follows:

"The said mortgagor covenants with the said mortgagee."

(1.) That the mortgagor will pay the mortgage money and interest and observe the above proviso.

(2.) That the mortgagor has a good title in fee simple, &c.

(3.) And that he has the right to convey, &c.

(4.) And that on default, &c.

(5.) And that the mortgagor will execute, &c.

(6.) And that the mortgagor has done no act to encumber the land.

(7.) And that the mortgagor *doth* release to the mortgagee all *his* claims, &c.

(8.) Provided, the mortgagee on default of payment for *three* months may, on giving *thirty days'* notice, enter, &c.

(9.) Provided, the mortgagee may distrain for arrears of interest.

(10.) Provided, that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable.

(11.) Provided, that until default of payment the mortgagor shall have quiet possession of the said lands.

The proviso for payment plainly expresses that it is the \$800 which is to be paid in yearly sums of \$100 each. The interest on that sum being excluded.

The parts of the mortgage which bear against the proviso are the first, ninth, and tenth covenants, in each of which interest is expressly agreed to be paid by the mortgagor.

The general rule in the construction of deeds is that effect must be given to the context if it can be done, and that the construction must be upon the entire instrument.

If there are repugnant clauses, which are plainly at variance with the general intention, they shall be rejected; and, if two clauses be plainly at variance, the former, in the case of a deed, stands. But, if the construction render the intention wholly uncertain and insensible, it will be void. The words of an instrument are to be taken most strongly against the party who uses them.

I refer generally to *Roe v. Tranmarr*, 2 Sm. L. C. 9th ed., 553; *Walsh v. Trevanion*, 15 Q. B. 733, and the cases there cited.

The covenants as to the payment of interest operate to defeat the estate, or to create a forfeiture, and in such case the deed should be construed strictly: *Holmes v. Love*, 1 R. & M. 138.

The covenants as to interest are printed, every word of them; and they may be differently construed in such a case than if they were in writing; *Robertson v. French*, 4 East 130, at p. 136; *Gumm v. Tyrie*, 33 L. J. N. S. Q. B. 67, at p. 108; *Jessel v. Bath*, L. R. 2 Ex. 267.

The first covenant is to pay the mortgage money *and interest, and observe the above proviso*. That can scarcely be read as separate and independent engagements to observe the proviso—and also to pay interest—for the proviso may be observed without the payment of interest.

Then the ninth covenant is the arrears of interest may be distrained for; but can there be arrears of interest under this proviso unless the principal is in arrear? and that will not be for some time yet to come; and the tenth covenant is if the interest *hereby secured*, is not paid, the principal is to be forthwith paid; but no interest is secured by the proviso of the mortgage.

If the words *with interest* in the proviso had not been struck out, it would have been clear from the covenants that interest would have been payable; but the deliberate cancellation of these words, and the express wording of

the proviso that the \$800 is to be paid in eight yearly instalments of \$100 each, seem to indicate that no interest was to be paid, and are almost equivalent to a declaration to that effect.

It seems unreasonable that under this mortgage, made in in December, 1867, no interest should be paid, and the first payment of \$100 should be payable only on the 3rd of June, 1887, that being one year after the testator's death. But unless the testator was deceived in the making of the deed, I do not see how the conclusion can be avoided that the deed must have its legal construction.

And I am forced to the conclusion that no interest is payable by the proviso of the mortgage until after each instalment becomes due, if the payment be then delayed.

The parties named in the will, will therefore take as appointees under the terms of the proviso as the principal falls due, but without interest.

NOTE.—The letters and words in the above covenants in italics are filled in in writing in the printed covenants in the mortgage.

*Judgment accordingly.*

---

## [CHANCERY DIVISION.]

## RE GILMOUR AND WHITE.

*Mortgage—Power of sale to trustees—Change of trustees—Exercise of power by new trustee—R. S. O. ch. 107, sec. 3.*

The R. S. O. ch. 107, sec. 3, provides that every new trustee shall have the same powers, authorities, and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust. Where a mortgage made in favor of two trustees of a marriage settlement, and which contained a power of sale exercisable by them, but not by an assignee of the mortgage, not being in conformity with the Short Form of Mortgage Act, was together with the lands therein, on the resignation of the trustees, assigned to a new trustee appointed in their place.

*Held*, that the new trustee stood in the place of the former trustees, and could exercise the power of sale, not as an assignee of the estate, but as if appointed a trustee by the deed creating the trust.

THIS was an application under the Vendor and Purchaser Act, on a sale by Robert Gilmour as trustee under the marriage settlement of Catherine Crookshank Heward, as vendor, to Thomas L. White, as purchaser.

The petition set out the making of a mortgage dated August 24th, 1874, upon the property in question, by Emma Fulton and William Henry Fulton, her husband, to Stephen Heward and Weymouth George Schreiber, as trustees under the marriage settlement of the said Catherine Crookshank Heward: that by an indenture dated October 20th, 1877, Robert Gilmour was appointed trustee of the said marriage settlement in the place and stead of the said Stephen Heward and Weymouth George Schreiber, and all the trust estate held by them was vested in the said Robert Gilmour; and the said mortgage and the lands therein described were granted and assigned to the said Robert Gilmour, to hold under the trusts in the said settlement: that the said mortgage contained a power of sale, worded as follows: "Provided that the said mortgagees on default in payment for one month, may, without giving any notice, enter on and lease or sell the said lands:" that default was made on the said



mortgage, and that the said Robert Gilmour had sold the said lands at public auction to the said Thomas L. White, but that the purchaser refused to take the said lands on the ground that the said Robert Gilmour had no power to sell them under the power of sale contained in the mortgage.

The application came up for argument on November 16th, 1887, before Proudfoot, J.

*R. L. Fraser*, for the purchaser. The power of sale in this mortgage is exactly similar to that in the case of *Re Gilchrist and Island*, 11 O. R. 537, and that case decided that the assignee had no power to sell, and must be followed here.

*James Reeve*, for the vendor. The petition shows that the mortgage was made to trustees, and Mr. Gilmour was substituted as a trustee in their place. They had the power to sell, and he has it in their place under R. S. O. ch. 107, sec. 3. The only effect of the decision in *Re Gilchrist and Island*, cited by my learned friend is, that where the main part of the power was omitted, the statutory long form of the mortgage did not apply to *assigns*, but the "assigns" here are only trustees in the same office *substituted* for others as to the same estate, so we must resort to R. S. O. ch. 107, sec. 3.

*Fraser*, in reply. We have nothing to do with the trusteeship here. The mortgage does not show in the *habendum* that it was made to them as trustees of any particular settlement. The use of the word "trustees," &c., added to the names of the parties was only descriptive.

November 18, 1887. PROUDFOOT, J.—Question under the Vendor and Purchaser Act. A mortgage under the Short Form of Mortgages Act was made on August 24th, 1874, by Emma Fulton and William Henry Fulton to Stephen Heward and Weymouth George Schrieber trus-

tees under the marriage settlement of Catharine C. Heward, wife of the said Stephen Heward, for securing a certain sum of money.

Afterwards on the 20th October, 1877, Robert Gilmour was appointed trustee under the marriage settlement instead of Stephen Heward and Weymouth George Schriber, and the mortgage and the lands therein described, were granted and assigned to him to hold under and subject to the trusts contained in the settlement.

The mortgage contained a proviso for sale on default in payment for one month, without any notice.

Default having been made in payment for more than one month, Gilmour offered the lands for sale by public auction, when Thomas L. White became the purchaser.

The purchaser objects to the title on the ground that Gilmour had no power to sell under the power of sale in the mortgage.

In *Re Gilchrist and Island*, 11 O. R. 537, the Chancellor, has held that under such a power resort could not be had to the long form in the Act, and that the mortgagee alone could sell.

But the present case is in a different position, for the mortgagees were trustees under a settlement, and Gilmour was appointed a new trustee in their stead.

The R. S. O. ch. 107, sec. 3, provides that every new trustee shall have the same powers, authorities, and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust.

A similar enactment was contained in the Imperial Statute 23 & 24 Vic. ch. 145, sec. 27, repealed and in substance re-enacted in 44 & 45 Vic. ch. 41, sec. 31.

By these enactments, which expressly provide for the transfer of the estate from the original to the new trustee, all the powers, authorities, and discretions contained in the trust deed are to be exerciseable by the new trustee as if he had originally been nominated a trustee by the deed creating the trust.

There is no question that the original trustees could have sold under the power of sale, and the new trustee steps into their place, and may exercise all the powers for realizing the trust property that they had, not as an assignee of the estate, but as if appointed a trustee by the deed creating the trust.

I think a good title can be made by Gilmour to the purchaser, and the purchaser must pay the costs.

G. A. B.

---

[CHANCERY DIVISION.]

RE GREEN AND ARTKIN.

*Mortgage—Power of sale in—Variation of power of sale in short form of mortgage—“ One month ” substituted for “ — months ”—Vendor and Purchaser Act R. S. O. ch. 109.*

G. was assignee of a mortgage made pursuant to the Act respecting short forms of mortgages, and which contained a power of sale in the words “ provided that the said mortgagee on default of payment for one month may on giving notice in writing enter on and lease or sell the said lands.” In an application under the Vendor and Purchaser Act R. S. O. ch. 109. *Held*, that the substitution of “ one month ” for “ — months ” was not a material variation in the form, and that G. could make a good title.

THIS was a petition under the Vendor and Purchaser Act, R. S. O. ch. 109, on a sale from Sarah Ann Green as vendor, to William Artkin as purchaser.

The vendor was assignee of a mortgage expressed to be made in pursuance of the Act respecting Short Forms of Mortgages, and he was making title under the power of sale contained therein.

The power of sale was in these words: “ Provided that the said mortgagee, on default of payment for one month, may, on giving notice in writing, enter on, and lease or sell the said lands.”

The petition was argued on November 30th, 1887, before Ferguson, J.

*Muir*, for the vendor. The vendor can make a perfectly good title under this power. There is no material variation from the statutory power.

*F. E. Hodgins*, for the purchaser. The use of the words "one month," in substitution of the words "—— months," is such a material variation from the form given in the first column of the statute, that the long form given in the second column does not apply. The vendor being an assignee cannot, therefore, exercise the power of sale: *Re Gilchrist and Island*, 11 O. R. 537; *Crosier v. Tabb*, 38 U. C. R. 54.

November 30, 1887. FERGUSON, J.—The variation of "month" for "months" is not a material variation. The spirit of the Act is not violated by such an alteration. I therefore think that the vendor can make a good title, and the purchaser must accept it.

*Petition dismissed, with costs.*

G. A. B.

---



## [CHANCERY DIVISION.]

## MAYS V. CARROLL ET AL.

*Will—Devise—Next of kin—Period of distribution—Construction—Executor.*

J. C. died leaving a wife, and E. C., a daughter. By his will, after giving all his property to his executors to pay the whole income to his wife for life or during widowhood, and after her death or second marriage, to pay the said income to his daughter, E. C., yearly, if she had attained the age of 21, for her life \* \* , he provided as follows: "And I hereby empower her, my said daughter, if she come into possession of the said income, and have lawful issue, to make a will bequeathing my said property absolutely to any or all of her said children in such manner as she may think best. And if she have no children, then the said property to fall to my next of kin who may be living on this continent," and further provided, "In case \* \* then notwithstanding anything heretofore provided, I will and direct that neither she (Ellen) nor any of her children shall receive any portion of my property, and in such case my whole property shall be given to my said wife absolutely, or if my said wife at that time be dead, then the property to go to my nearest of kin as above provided." The wife died and the daughter, E. C., attained 21, came into possession of the income and died unmarried without issue, having made a will appointing the plaintiff her executor. In an action by the plaintiff, M., as executor of the daughter, E. C., against W. C. and F. McQ., as executors of the testator, J. C., for the property, which the defendants resisted on the ground that the next of kin of the testator, other than E. C. were entitled to it. It was

*Held*, that the "next of kin" must be ascertained at the death of the testator, J. C., and not at the death of his daughter, E. C., and as E. C. was sole next of kin, and being tenant for life, she had also a remainder in fee expectant on her own death, and contingent upon her dying without issue, and that this was such an interest as would pass by her will, and the plaintiff, as her executor, was entitled to the property.

THIS was a motion for judgment, on the pleadings, in an action brought by James Mays, who was the executor of the will of one Ellen Carroll, deceased, the daughter and devisee of one John Carroll, deceased, against William Carroll and Francis McQuillan the executors of the said John Carroll.

The will was set out in the statement of claim and the principal clause in question was in these words: "And I hereby empower my said daughter, if she come into possession of the said income, and have lawful issue, to make a will bequeathing my said property absolutely to any or all

of her said children in such manner as she may think best. And if she have no children then the said property to fall to my next of kin who may be living on this continent.' The will also contained this clause: "In case \* \* then notwithstanding anything heretofore provided, I will and direct that neither she (Ellen) nor any of her children shall receive any portion of my property, and in such case my whole property shall be given to my said wife absolutely, or if my said wife at that time be dead then the property to go to my nearest of kin as above provided."

The said daughter Ellen Carroll attained twenty-one years of age, came into possession of the income, and died unmarried, and without issue, having made a will by which she disposed of the said property and appointed the plaintiff her executor.

The plaintiff demanded the property from the defendants the executors of John Carroll, and they declined to convey and transfer to him, alleging that it belonged to the next of kin of John Carroll, *other* than the said Ellen Carroll.

The question to be decided was, at what time the next of kin was to be ascertained, viz., at the death of the testator, John Carroll, or at the death of Ellen Carroll?

The motion was argued on September 21st, 1887, before Ferguson, J.

*G. W. Field*, for the plaintiff. The plaintiff's testatrix was the next of kin of the testator at the death of her father, and that is the period at which his next of kin are to be ascertained, so she took absolutely: *Mortimer v. Slater*, 7 Ch. D. 323; *Holloway v. Holloway*, 5 Ves. 399; *Bird v. Luckie*, 8 Ha. 301; *Gundry v. Pinniger*, 1 D. M. & G. 502; *Bullock v. Downes*, 9 H. L. C. 1. The language of the will did not exclude the daughter from taking as next of kin, nor did it prevent the estate from vesting in her at the death of her father: *Hawkins on Wills*, 2nd ed., 100, 101, and cases there cited.

*J. L. Murphy*, for the defendants. There is an executory devise in the will. The intention in favour of the daughter was limited. There was an exclusion in certain circumstances. The time at which the property was to pass was at the time of the death of the daughter without issue. The intention was clear that whoever filled the description of next of kin at the daughter's death were the next of kin intended. The word "then" shews the time when the next of kin were to be ascertained. This is an executory devise to spring up on the happening of an event, and that was the death of the daughter, and she could not take after her own death. I refer to *Hawkins*, 2nd Am. ed., 99; *Wharton v. Barker*, 4 K. & J. 483; *Pinkham v. Blair*, 57 New Hamp. 226; *Sears v. Russell*, 8 Gray (Mass.) 86; *Elmsley v. Young*, 2 My. & K. 780; *Druitt v. Seaward*, 31 Ch. D. 234. The next of kin intended in this will are nearest relations, not the next of kin technically under the Statute of Distributions: *Rees v. Fraser*, 25 Gr. 253. Next of kin is equal to heirs: *Jones v. Colbeck*, 8 Ves. 38.

September 29, 1887. FERGUSON, J.—This is a motion for judgment on the pleadings, and it involves the construction of the will of the late John Carroll, who died on the 4th day of April, 1874, leaving him surviving his widow, Mary Carroll, and one child, Ellen Carroll. His will bears date the 14th May, 1873. The widow Mary Carroll died on the 7th day of July, 1885, and Ellen Carroll died on the 4th day of May, 1887.

The plaintiff is the executor and trustee of the will of Ellen Carroll. The defendants are the executors and trustees of the will of John Carroll. By this will the testator John Carroll gave all his property real and personal to his executors in trust after paying debts, &c., to pay the whole income to his wife during her life if she should so long remain his widow, and after her decease or second marriage to pay the said income to his daughter Ellen Carroll, yearly, if she should have attained the age of

twenty-one years, for her life, and if she should not have arrived at that age to apply the income or as much thereof as might be necessary to her support and education until she should be twenty-one years old, when she should receive the whole income yearly for her life.

The will then proceeds in these words: "And I hereby empower her, my said daughter, if she come into possession of the said income and have lawful issue, to make a will bequeathing my said property absolutely to any or all of her said children in such manner as she may think best. And if she have no children, then the said property to fall to my next of kin who may be living on this continent." The other clauses of the will do not seem to be of importance in the present case, as they chiefly provide for cases that have not arisen, and they were not made the subject of any contention at the bar. One of them, however, refers also to the testator's next of kin and is as follows:

"In case my daughter Ellen (which God forbid) should, depart from the path of virtue, and become the mother of an illegitimate child, then notwithstanding anything heretofore provided, I will and direct that neither she nor any of her children shall receive any portion of my property; and in such case my whole property shall be given to my said wife absolutely, or if my said wife at that time be dead, *then* the property to go to my nearest of kin *as above provided*."

The property is of the value of about \$2000, and is real estate. Ellen Carroll attained the age of twenty-one years, and came into possession of the income of the estate, and died unmarried, without issue, having first made a will whereby she appointed the plaintiff executor and trustee, and directed that he should sell and convert the property and apply the proceeds according to the provisions in that behalf in the will. The plaintiff, as such executor and trustee, demanded from the defendants a transfer and conveyance of the estate. This the defendants have refused to give, and they continue to collect the rents, and decline to account to the plaintiff for the same. The provisions of



the will of Ellen Carroll are not in question at all, it being assumed that if she had power to make a will disposing of the property the plaintiff, the executor and trustee under the will that she did make, is entitled and should succeed in this contention.

The matter of law that was most discussed at the bar was the one as to the time at which the "next of kin" of the testator, John Carroll, living on this continent, should be ascertained, regard being had to the provisions of his will, namely: Whether at his own death or at the death of his daughter Ellen Carroll. On this subject many authorities were referred to, and the arguments were as I thought incisive. Both counsel seemed to assume that if the next of kin of John Carroll were, under the provisions of his will, to be ascertained at his death and not at the death of his daughter, the plaintiff should succeed in his contention, for in such case the daughter Ellen Carroll would be the sole next of kin. In the will there is no reference in connection with the expression "next of kin" to the Statute of Distributions, and in such case as is said by Mr. Justice Proudfoot in the case *Rees v. Fraser*, 25 Gr. at p. 254, the expression is interpreted to mean "nearest in blood." The learned Judge there refers to authorities on the subject, *Withy v. Mangles*, 10 C. & F. 215, and *Holton v. Foster*,<sup>2</sup> L. R. 3 Ch. 505. The learned Judge on the same page says that there is nothing to prevent the heirs taking personal property as *personæ designatæ*, nor the next of kin real estate in the same way.

In *Hawkins on Wills*, at p. 99, the general rule is laid down that "A devise or bequest to 'next of kin,' 'next of kin according to the statute,' &c., means the next of kin at the death of the person whose next of kin are spoken of," and the author proceeds: "Thus if the gifts be to A. for life, and after his decease to the next of kin of the testator, the persons to take as next of kin are to be ascertained at the death of the testator and not at the death of A. And the rule applies, although the tenant for life be the sole next of kin, or one of the next of kin, at the death of

the testator and at the date of the will. Thus, if the gift be to A. for life, and after his decease to the next of kin of the testator, and A. is the sole next of kin at the death, A. takes the property absolutely.

\* \* \* \* \*

Where the testator gives property to a tenant for life, and after the death of the tenant for life to his next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of the testator's words, the next of kin of the testator living at his death will take; and if the tenant for life be such next of kin, either solely or jointly with other persons, he will not on that account be excluded.

In the case of a bequest in trust for A. for life, and from and after his death in trust for a class of persons, as for example, the testator's next of kin; this is an immediate gift to the persons answering the description of the testator's next of kin at his death, subject to the life interest given to A.

In the case of a bequest in trust for A. for life, and from and after his death in trust for the testator's next of kin, A. being himself the next of kin, or one of the next of kin, there is no reason for holding that A. would be precluded by the gift to him of the life estate from taking under the gift to the next of kin; nor for holding that the next of kin who are to take are those who may be such at the death of A."

It is also stated that "The language of the will *may* be such as to show that the testator intended the next of kin to be ascertained at the period of distribution; but that the later cases are generally adverse to this construction. It is said to be settled that words of futurity alone do not exclude the rule: as if the gift be (in remainder after a life interest) to the person or persons who *shall be* the next of kin of the testator." *Hawkins*, 101.

In the case *Wharton v. Barker*, 4 K. & J. at p. 501 Sir W. Page Wood said: "In this state of the authorities I find it recognised in all the decisions, that if, in a gift

to 'next of kin,' without referring to their claiming as under an intestacy, the word 'then' occurs as an adverb of time, referring to the death of the tenant for life or other event fixed as the period of distribution, that circumstance is conclusive evidence that the testator did not intend the general rule of construction to apply."

In the present will, however, we have not that word, or any such word so used. The words are: "and if she have no children, then the said property to fall to my next of kin who may be living on this continent," words of futurity only, and as such not even emphatic words. I do not find in this will anything that seems to me sufficient to take the case in this respect out of the general rule, and after perusing the cases referred to on the argument *Gundry v. Pinniger*, 1 D. M. & G. 502; *Bullock v. Downes*, 9 H. L. C. 1; *Bird v. Luckie*, 8 Ha. 301; *Holloway v. Holloway*, 5 Ves. 399; *Mortimer v. Slater*, 7 Ch. D. 323; *Wharton v. Barker*, 4 K. & J. 483; *Pinkham v. Blair*, 57 N. H. 226; *Sears v. Russell*, 8 Gray (Mass.) 86; *Elmsley v. Young*, 2 M. & K. 780; *Jones v. Colbeck*, 8 Ves. 38; *Long v. Blackall*, 3 Ves. 486, the remarks upon this case of L. J. Turner in *Lees v. Massey*, appearing in *Dale & Lehman's Digest* at p. 1496, as well as the reference made to *Hawkins* on Wills, and *Jarman* on Wills, I am of the opinion that the general rule of construction does apply in the present case, and the "next of kin" must be ascertained at the death of the testator, John Carroll, and not at the death of his daughter Ellen Carroll; and in this view of the case it was admitted that Ellen Carroll was the sole next of kin. It is also admitted that she became the tenant for life; and I think that being tenant for life, she had as well a remainder in fee expectant upon her own death and contingent upon her dying without issue. This was such an interest as would pass by her will. It is undisputed that her will was sufficiently made and executed.

The contingency has happened in favor of the remainder, and I think the plaintiff, as executor and trustee under the will of Ellen Carroll, is entitled to the property. In con-

sidering the case I have not lost sight of a subsequent clause in the will, which I have above set out, in which there appears the mention of the testator's nearest of kin to the exclusion of his daughter Ellen Carroll, and her children, but that clause provides for an event that has not happened, and besides there appears to me to be nothing in it to exclude the general rule of construction.

The word "then" is plainly not used in either of the clauses referred to, as an adverb of time; and, looking at the whole will I perceive nothing in it which, in the light of the authorities, appears to me sufficient to take the case out of the general rule; and I am of the opinion that the plaintiff, as executor and trustee, is entitled to the property and to the relief he asks. Both parties should have their costs (solicitor and client) out of the estate.

*Judgment accordingly.*

G. A. B.

---



## [CHANCERY DIVISION.]

## RE STEVENS—STEVENS V. STEVENS.

*Will—Legacies—Time for vesting.*

S. by his will gave four legacies to his daughters in four different clauses, each worded as follows: "I bequeath to my daughter ——— the sum of five hundred dollars." By a subsequent clause he provided: "I also order that should any of my daughters die their portion to be equally divided among the remaining ones." The legacies were charged on his lands. Directions were also given that after a certain farm which he had purchased but not paid for in his lifetime was paid for, and all his debts paid, his two sons E. and A. "shall each pay my daughter M. A. S., the sum of \$50, which she shall receive together with the rent of Lot 126 (from the executors), to apply on her legacy. The other three daughters to be paid in the same manner, E. in one year after M. A., &c." A direction was also given, that in case of any of the daughters dying, their funeral expenses were to be paid out of their legacies, and in case of sickness their physician's bill to be paid from the same source. *Held*, on an appeal from a Master, that these provisions and all others of a like kind in the will, had reference at most to the mode and time of *payment* of the legacies, and not to the substance of the gift, and that as the testator had not clearly and with certainty expressed the intention that the legacies should not vest until the times of payment, the legacies were given in the ordinary way to vest upon the death of the testator.

THIS was an appeal from a Master's report in an administration suit brought by Harriet D. Stevens against Elijah Stevens, and others, for the administration of the estate of one Elijah Stevens, deceased.

The point in dispute was, as to the time of the vesting of four legacies bequeathed to four daughters of the testator by the 5th, 6th, 7th, and 8th clauses of his will.

The Master found that the vesting of these legacies was postponed until the period of distribution.

The appeal was argued on September 12th and 19th, 1887, before Ferguson, J.

*Moss*, Q. C., and *Hoyles*, for the appellants. There are no words in the will exonerating the personalty from the payment of these legacies to the daughters. The legacies vested on the death of the testator. As to a gift in case of death, see *Theobald* on Wills, 3rd ed. 449, *Elliott v.*

*Smith*, 22 Ch. D. 236. The reference in the will to the death of the legatees, means death during the lifetime of the testator. If there had been sufficient personal estate, the legatees could have enforced payment out of it. Unless the legacies vested at the time of the testator's death, they would never vest, as no time is pointed out at which they should vest. No definite time is fixed when the debts and liabilities should be paid. There is a postponement of the time of payment only, not of the vesting; 1 *Jarman* on Wills, 4th ed., 820, 834; *Williams* on Executors, 8th ed., 1231, 1232, 1233.

*Jas. Maclellann*, Q.C., for the infant. The scheme of the will is, to give half of the homestead to one son, and half to another. Full provision was made for the maintenance of the family after the testator's death; but there is no provision for the payment of any part of the legacies until the Clergy farm is paid for. The reference to death of the legatees means death before the payment, *i. e.*, before anything *was due* on the legacies. It is the same as if the death was expressed to be before the time fixed for payment of the first part of the legacies. The testator dealt with a period subsequent to his own death: see *Hawkins* on Wills, 254; *Theobald*, 451, 459. There was a third son who was to get the Clergy farm when it was paid for. See also *White v. Baker*, 2 D. F. & J. 55.

*Cassels*, Q.C., for other respondents. The language referring to death of legatees means "death" after the death of the testator. See also the words "die before being married." Taking all the clauses of the will together, it appears the testator meant "death" after his own death: See *Williams* on Executors, 8th ed., 1232.

*Moss*, Q.C., in reply. The period of vesting must be fixed by the will, and if that was not at the death of the testator, no period was fixed at all. Even if the testator contemplated another time it must manifestly appear on the face of the will, or the ordinary one, the time of his own death, will be adopted. The fact that there was a gift over argues that there was a vesting: *Jarman*, 4th ed. 835. I refer also to *Edwards v. Edwards*, 15 Beav. 357.

October 1st, 1887. FERGUSON, J.—This is an appeal from the report of the Master at St. Catharines. The question in contention is, as to the proper construction of the last will of the late Elijah Stevens, in respect to the four legacies given respectively to his four daughters; namely as to whether or not these legacies vested upon the death of the testator or were contingent. As to these the learned Master in his report, says: "As to the legacies to his four daughters of \$500 each, I find that they did not become vested in the said legatees on the death of the testator, but that by the terms of the said will the vesting thereof was postponed until the period of distribution thereof, the said legacies to be paid to the survivors of the said daughters of said testator at such period." From this finding or decision of the Master is the appeal.

The plaintiff, Harriet D. Stevens, is one of these legatees. Another is Isabella Stevens, an infant. They are the two survivors of these four legatees, daughters of the testator. The testator died in May, 1879. Mary Ann Stevens, one of these four legatees, assigned her legacy to Alfred Stevens on the 2nd November, 1880, and died the 9th of January, 1884. Emma Jane Stevens, another of these four legatees died the 6th of January, 1882, unmarried. It thus appears that the whole four daughters (legatees) survived the death of the testator.

The contention of the appellants is, that these four legacies vested respectively in the four respective legatees on the death of the testator. The respondents contend that they did not vest at that period, but were contingent and to vest at some subsequent period if at all.

The four legacies are given by the fifth, sixth, seventh, and eighth paragraphs of the will, which paragraphs are as follows:

"5. I bequeath to my daughter, Mary Ann Stevens, the sum of five hundred dollars, (\$500.)"

"6. I bequeath to my daughter, Emma Jane Stevens, the sum of five hundred dollars, (\$500.)"

"7. I bequeath to my daughter, Harriet Delilah Stevens, the sum of five hundred dollars, (\$500.)"

"8. I bequeath to my daughter, Isabella Stevens, the sum of five hundred dollars, (\$500.)"

It is not contended that anything contained in the will has the effect of exonerating the personalty from the payment of these legacies. If these gifts stood alone in the will, it could not, I think, be said that they did not vest in the legatees immediately on the death of the testator.

In the ninth paragraph of the will is contained a direction in these words: "I also order that should any of my daughters die, their portion to be equally divided among the remaining ones." The death referred to here would, according to the ordinary rule, mean or be death during the life of the testator, unless, at all events, by the other parts of the will a contrary intention appear, and I do not think such contrary intention does appear: See *Hawkins* on Wills, 254, 255, and cases there referred to; also *Elliott v. Smith*, 22 Ch. D. 236.

The ninth paragraph of the will is very long, and according to my view of it, very peculiar. The respondents contend that notwithstanding the plain words of the gifts, certain parts of the ninth paragraph read in connection with the remainder of the will, shew that these legacies did not vest, and were intended by the testator not to vest at the period of his death.

The testator had one farm, and he had purchased another, which, it appears, was not altogether paid for. I mention this for the purpose of the better understanding certain passages in this ninth clause that will be referred to; but I think I need not refer to the various peculiar provisions regarding certain of his chattel property, and the manner in which he desired his family to live for a period after his death. By one passage in the ninth clause, the testator makes the bequests to his daughters a charge upon his lands. The homestead is given to the two sons, Elijah and Albert, and the testator directs that after the two years, before mentioned in this clause, have expired, and they (these two sons) have taken possession of the homestead under the terms of the will, they shall each pay the



sum of fifty dollars a year to the executors, to apply in payment for the other farm, and that when that farm is paid for, then they shall continue each to pay the fifty dollars annually to the executors, to be applied in payment of the legacies to his daughters. Another direction is, that after the farm is paid for it shall continue to be rented by the executors, and the amount realized applied towards the payment of the legacies to his daughters.

A further direction is, that in one year from the time all the testator's debts and liabilities are paid, his sons Elijah and Albert shall each pay to the daughter Mary Ann Stevens, fifty dollars, which she shall receive together with the rent of the farm (not the homestead) to apply on her legacy, the other daughters to be paid in the same manner. Emma in one year after Mary Ann, and Harriet in one year after Emma, and Isabella one year after Harriet, and that in one year after that Mary Ann should receive the balance of her legacy, &c., &c.

In another part the testator directs as follows :—"Should either of my daughters die before they get married, their funeral expenses must be paid out of their legacies; also, should they, or either of them be taken sick, and be sick for a longer or shorter period, and die of such sickness, then the physician's bill must be paid out of their legacies."

These, and perhaps some other clauses were relied on by respondents to shew that the legacies did not vest as contended by the appellants.

It seems to me that each and every of these provisions so far as it relates to the legacies in question, and every provision of a like kind that I find in the will has reference at most to the mode and time of payment of the legacies, or some part thereof, or certain deductions from the amount thereof.

In 1 *Jarman* on Wills, 4th ed., at p. 837, it is said: "A leading distinction is, that if futurity is annexed to the substance of the gift, the vesting is suspended, but if it appears to relate to the time of payment only, the legacy vests *instantly*." After some examples, the author further

says: "But if the legacy is, in the first instance, given to the legatee, and is then directed *to be paid* at the age of twenty-one years, or at the end of ten years after the testator's decease, the legacy vests immediately, so that, in the event of the legatee dying before the time of payment, it devolves to his representative." At page 838, the same author says: "Words directing division or distribution between two or more objects at a future time, fall under the same consideration as a direction to pay, and therefore where they are ingrafted on a gift which would, without these superadded expressions, confer an immediate interest, they do not postpone the vesting." And further on: "The same rule prevails where payment is in terms postponed until the testator's debts are satisfied, or his assets realized, or an outstanding security is got in, or until certain real estate is sold, or money directed by the will to be laid out in the purchase of land is so laid out," \* \* and it is of course immaterial whether the gift precedes or follows the direction to pay."

The same rules are found in many of the books and cases, though expressed in different words: thus in *Williams on Executors*: "When a future time for the payment of the legacy is defined by the will, the legacy is vested or contingent according as upon construing the will it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it, p. 1230." When the bequest is in terms immediate, and the payment alone postponed, the legacy is vested.

If, however, upon construing the whole will, it *clearly* appears that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executor or administrator if the legatee dies before the period of payment: *Williams on Executors*, 8th ed., 1232. But in these cases the intention of the testator must be expressed *with certainty* to prevent the operation of the general rule: *Williams*, 1233.

In the present case the parts of the will relied upon by the respondents to shew that these legacies did not vest

at the death of the testator appear, as I have already said to relate to the payment of the legacies, or part of them, or to certain deductions from them in certain events, and not to the substance of the gift. It may be added that they have relation also to the imposition of obligations upon others to pay the legacies, or part of them, and upon a perusal of the whole will, I cannot see that the testator has clearly, and with certainty, expressed the intention that the legacies should not vest until the times that it is contended are the times for payment; and I fail to see that he has at all stated or meant to state such an intention.

The legacies seem to me to have been given in the ordinary way of giving pecuniary legacies to vest upon the death of the testator, and I think that there is nothing in the will to show, or at all sufficient to show, that they were not to vest then, or that they were to vest at any other time. All the four legatees survived the death of the testator. Upon his death the legacies vested absolutely, in my opinion. On this subject I think that the learned Master was in error, and that the appeal must be allowed, and with costs.

*Order accordingly.*

G. A. B.

## [CHANCERY DIVISION.]

## HERCHMER V. ELLIOTT ET AL.

*Mistake—Misrepresentation—Deed—Assignment of mortgage—Innocent purchaser—Duty of enquiry.*

P. P. mortgaged certain lands to J. H. as security for \$2,100 and interest, who left the mortgage with E. G. P., a solicitor, for safe keeping. Afterwards K. E. a client of E. G. P., sold his farm to his own son for \$1,700, who, through E. G. P., procured the advance of the purchase money from a Loan company on mortgage, and the money being transmitted to E. G. P., the latter retained it, and handed to K. E. as security for it what purported to be an assignment of the mortgage from P. P. to J. H., executed by J. H., which K. E. registered.

J. H. now brought this action, denying the validity of the said assignment and claiming the removal of it as a cloud upon her title, and for payment of the mortgage by P. P., or on default a sale of the land. K. E. set the defence of a *bonâ fide* purchase by him of the said mortgage without notice.

*Held*, that inasmuch as it appeared that J. H. executed the assignment upon a misrepresentation of its nature, character, and contents, believing it only to provide for an extension of the term of payment of the mortgage held by her, the assignment was void, even in the hands of an innocent holder and should be cancelled. There being no transmission of estate legal or otherwise, there was no basis on which to found a defence of purchase for value.

*Held*, also, that under the circumstances, the transfer of the mortgage to K. E. was not carried out in such a way as to make him a purchaser for value of it, inasmuch as K. E. who dealt solely with E. G. P. in the matter, knew he was paying no money which could possibly go to satisfy J. H., but was taking the assignment as security for the money due from his son to him, and therefore had no reason to trust to any statement in the assignment that J. H. had been paid her mortgage money, and was not justified in accepting the assignment without the privity of J. H.; and therefore on this ground J. H. was entitled to relief by way of lien for the mortgage money.

Doctrine of *ex parte Swinbanks*, 11 Ch. D. 525, applied.

THIS was an action brought by Jemima Herchmer against Kennedy Elliott and Peter Post for the removal of a cloud upon her title to certain lands, and other relief, as hereinafter mentioned.

The statement of claim alleged that the plaintiff was a widow, and the defendants farmers: that the defendant Peter Post, being the owner in fee, in possession, of certain lands, by a deed of mortgage dated April 16th, 1875, conveyed them to the plaintiff to secure the repayment of \$2500, with interest at seven per cent. per annum, which mortgage she (the plaintiff) left for safe keeping with one E. G. Ponton, a practising solicitor in Belleville: that the



said Ponton being indebted to the defendant Elliott and pressed by him for payment, fraudulently and without authority from her, and without her knowledge and consent, executed and delivered to Elliott an indenture purporting to be an assignment of the said mortgage security and moneys from her, the plaintiff, to Elliott, which pretended assignment was dated November 9th, 1884, and was by the said Elliott registered in the registry office of the county in which the lands were, on November 19th, 1884: that Elliott claimed to be entitled to receive the mortgage money: that there was due the plaintiff on the said mortgage security \$2290, for principal and interest: that the registration of the pretended assignment of mortgage was a cloud on her title to the lands, and that she sought to have the said cloud removed, and to have it declared that the said pretended assignment was null and void, and of no effect, and that Elliott might be ordered to remove the same: that the defendant Post might be ordered to pay to her the amount due on the mortgage, and that for that purpose all necessary and usual accounts and enquiries might be taken, and on default of payment a sale of the lands might be had, and the proceeds applied in liquidating the mortgage, and the defendant Post might be ordered to pay the deficiency, if any, and for possession of the lands.

The defendant Elliott delivered a statement of defence setting up that he was a purchaser of the mortgage in question, and grantee of the lands therein set forth, and as such entitled to receive the moneys secured by such mortgage, and that in due course he was given the possession of the mortgage in question and the assignment thereof to him, duly executed and delivered by the plaintiff, as he believed: that by virtue of the said assignment he claimed to be entitled to the mortgage money thereby secured: and he claimed to be a *bonâ fide* purchaser of the said security for value and without any notice of any fraud or fraudulent dealing by the said E. G. Ponton, or anyone else, and as such entitled to be paid the mortgage moneys and his costs of defence.

It appeared that the defendant Post had executed a mortgage on the lands in question to the plaintiff, which the latter had left for safe keeping in the hands of her solicitor E. G. Ponton. She subsequently at the instigation of Ponton executed what was represented by him to her as an instrument extending the time for the payment of the mortgage, but in reality was an absolute assignment of it to the defendant Elliott in consideration of \$2100.

The action came on for trial on October 27th, 1887, at Belleville before Boyd, C., in whose judgment *infra* the other facts of the case sufficiently appear.

*Dickson*, Q. C., for the plaintiff, referred to *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Swan v. North British Australasian Co.*, 2 H. & C. 175; *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Carr v. London and North Western R. W. Co.*, L. R. 10 C. P. 307, 318; *Seton Laing & Co. v. Lafone*, 19 Q. B. D. 68; *Johnson v. Blumenthal*, L. R. 3 C. P. D. 32; *Baxendale v. Bennett*, 3 Q. B. D. 525; *Agricultural Investment Co. v. Federal Bank*, 45 U. C. R. 214, 6 A. R. 192; *Burrows v. Leavens*, 29 Gr. 475; *Preston v. Luck*, 27 Ch. D. 497; *Hughes v. Moore*, 11 A. R. 569; *Smith v. City of London Ins. Co.*, 11 O. R. 38; *Molsons Bank v. Turley*, 8 O. R. 293; *Mason v. Bickle*, 2 A. R. 291.

*Cassels*, Q. C., and *G. A. Skinner*, for the defendant. The legal estate is in the defendant if the signature to the assignment is a signature, and the plaintiff has to suffer because she trusted her mortgage out of her hands. One has the legal estate and the other not. We refer to *Merchants Bank v. Lucas*, 13 O. R. 531.

November 5th, 1887. BOYD, C.—If the plaintiff's evidence is taken implicitly, her signature to the instrument purporting to assign the mortgage in question to Kennedy Elliott is a forgery and therefore the defendant's deed is invalid. If the defendant Elliott's evidence is taken (*i.e.*, the evidence of the solicitor, the only witness he called on this point) then the plaintiff executed the assignment upon a

misrepresentation made as to its nature, character, and contents. She was told and believed that it was to provide for an extension of the term of payment of the mortgage held by her, and that only. Her signature, in this view, was obtained by a piece of deception which involved a fundamental mistake on her part, and the assignment according to authorities by which I am bound would be void even in the hands of an innocent holder: *Thoroughgood's Case*, 2 Co. 9 b.; *Vorley v. Cooke*, 1 Giff. 230; *Ogilvie v. Jeaffreson*, 2 Giff. 353; *Dominion Bank v. Blair*, 30 C. P. 591, (judgment of Proudfoot, J., which is, on this head of law, not impeached.) I prefer to place the case on this ground rather than on that of forgery though it may necessitate an amendment of the pleadings on the plaintiff's part. The undisputed evidence, however, warrants any such amendments as are required to nullify the instrument on the ground of fraud and deception. If *Vorley v. Cooke* is correct, then this deed is void and one, therefore, under which no estate passed. If there is no transmission of of estate, legal or otherwise, then there is no basis on which to found a defence of purchase for value. In this view the alleged assignment of the Post mortgage to Elliott, the defendant, is a cloud upon the plaintiff's title, and cancellation of that assignment should be adjudged.

I am also of opinion that the plaintiff is entitled to substantial relief on another ground, *i. e.*, by way of lien for the mortgage money. It is not pretended that the plaintiff was paid any part of the money due on her mortgage at the date of the alleged assignment; and in the circumstances of this case the defendant Elliott could not have supposed that it was paid to her. The transfer of the mortgage to Elliott was fraudulently procured by Ponton, the solicitor, and it was not carried out in such a way as to make him a purchaser of it for value as against the plaintiff. The consideration as far as Elliott was concerned arose in this way: he had before sold a farm to his son for which he was to be paid \$1700. The son raised this sum by a mortgage on the land bought, which was negotiated with a

Toronto Investment Company through Mr. Ponton, who was the local agent. The \$1700 was transmitted payable to Ponton and Kennedy Elliott's son. The son gave Ponton an order to draw the money that it might be deposited in a bank, and a deposit receipt therefor sent to his father. Ponton, it is to be inferred, received the money but did not send a deposit receipt; instead of it he procured the direct assignment of the mortgage now in question from the plaintiff to Elliott. Having obtained this, Ponton forwarded it to the defendant Elliott as security for and representing the \$1700 which his son owed him. The Post mortgage was good for \$2100 at 8 per cent. interest, but part of the arrangement between Ponton and the defendant was that Ponton could get back the Post mortgage, at any time, on paying the \$1700, and 10 per cent. interest thereon. The defendant, therefore, dealt with Ponton, and knew that no money was being paid by him which could possibly go to satisfy Mrs. Herchmer, and he had therefore no reason to trust to any statement in the assignment that she had been paid the \$2100 therein mentioned. The father was examined but could give no account of how he came to be in possession of the mortgage. This was owing to his age and the elaborate complications in which the transaction had been involved by the solicitor for his own sinister purposes. The son, who put Mr. Ponton in motion, was aware that default had been made in the procurement of the deposit receipt, and he had therein a very clear warning that the solicitor was not a man to be trusted. It appears to me that as against the defendant Elliott the doctrine of *Ex parte Swinbanks*, 11 Ch. D. 525 applies, and that the possession of the assignment of the mortgage, apparently executed by the mortgagee, did not authorize the solicitor to pledge it for a debt of his own, or justify the defendant in accepting it without the privity of the plaintiff: *In re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387.

This is a case of extreme hardship, however it is decided: it is a claim between two *bonâ fide* claimants who have been imposed upon by a solicitor who betrayed them both.



Considering how I have disposed of the case, by allowing the plaintiff to amend, it is proper I should exercise a discretion as to the costs by making no order on that head.

The judgment will be to declare a lien or to cancel the assignment, as the defendant Elliott may elect, without costs.

A. H. F. L.

---

[CHANCERY DIVISION.]

DICKSON V. MONTEITH ET AL.

*Mandamus—Surrogate Judge—Grant of administration—Jurisdiction—Verdict of Jury—Issue to try validity of will—R. S. O. ch. 46, sec. 31.*

A mandamus was directed to issue to compel the Judge of the Surrogate Court of the County of Wellington, to grant administration with the will annexed of a certain testator to G. D., one of the next of kin (who had filed all necessary papers), notwithstanding that in an issue directed out of the said Surrogate Court a jury had found against the will. It appeared that the present applicant was no party to that issue, and that since the trial of it this Court had held in favor of the will.

*Held*, also, that this was not a case for an appeal from the refusal to grant administration under the 31st section of the Surrogate Court Act, because an appeal under that section would appear to be granted only when some one contests the grant of administration, which no one was doing here.

*Semble*, that this Court has jurisdiction to declare a will valid.

THIS matter came up pursuant to an order of this Court, made upon October 5th, 1887, upon motion on behalf of one George Dickson, whereby it was ordered that George A. Drew, Judge of the Surrogate Court of the county of Wellington, should, on October 24th, 1887, shew cause why he should not as such Judge, be ordered and commanded, and why a *mandamus* should not be granted, ordering and commanding him as such Judge to grant to the said George Dickson letters of administration with the will of James Dickson annexed, which will was filed in the said Surrogate office.

It appeared that shortly after the death of James Dickson, which took place on May 18th, 1885, two of the

executors named in his alleged will (the third having renounced) applied to the said Surrogate Court for probate, but the application was opposed by Samuel Dickson, a brother of the deceased, on the ground that the testator was not at the time of the making of the alleged will, of sound mind, memory, or understanding, and that the alleged will was not signed by him. The Surrogate Court thereupon directed a trial of such questions of fact before a jury at the ensuing County Court sittings under R. S. O. ch. 46, sec. 18. The said questions of fact were accordingly tried, and the jury on December 22nd, 1885, found the following verdict: "That the said James Dickson was not, at the time of the making and signing of the said will, of perfect sound mind, memory, and understanding, and the will was not signed by James Dickson," and judgment was afterwards duly entered or signed on said verdict in the said Surrogate Court, and was not afterwards set aside or appealed from. The alleged will was filed in said suit at the trial.

On January 8th, 1886, an action was commenced in the Chancery Division by one of the devisees named in the will, also of the name of James Dickson, against the executors named in the will, and the other legatees and devisees and next of kin, to have it declared, amongst other things, that the said will was and is the last will of the said James Dickson, deceased; which action was tried in March, 1886, at Stratford, before Proudfoot, J., who pronounced judgment on March 11th, in terms declaring the said will to be the last will of James Dickson, and that the same was duly executed and published by him when he was of sound mind, memory, and understanding, and that the devises, limitations, bequests, and other provisions in it were good and valid in law; and further, that it was entitled to be admitted to probate in the proper Surrogate Court, and granting a perpetual injunction against Samuel Dickson restraining him from prosecuting further the proceedings and contestation in the said Surrogate Court, and against him and the other defendants

restraining them from disputing the validity of the will, and further prosecuting the said contestation; and this judgment was, on appeal, to the Divisional Court, affirmed.

Notwithstanding this judgment Samuel Dickson and John Jacob, his solicitor, continued to prosecute the contestation in the Surrogate Court, whereupon a petition was presented in the suit in the Chancery Division by two of the parties defendant thereto, being two of the executors named in the will, setting out this fact, and that the Judge of the Surrogate Court considered he was not bound or required to grant the probate pursuant to the judgment and had announced his intention of giving judgment upon an application for a new trial made in the contestation in the Surrogate Court, and praying for an injunction against Samuel Dickson, or his solicitor, from further interfering in the contestation in the Surrogate Court, or from in any way pressing the same, and on June 15th, 1886, the Court granted a perpetual injunction to that effect.

On January 24th, 1887, an application was made on behalf of George Dickson for administration, with the will annexed, to Judge Drew, who, on April 2nd, 1887, refused the application, delivering the following written judgment :

“This is an application by George Dickson, brother of James Dickson deceased, for letters of administration with the will annexed. I am asked to grant such administration on certain papers handed to me.

“{Copy of will of said James Dickson. Administration bond. Judgment of the Supreme Court of Judicature for Ontario, Chancery Division. Petition presented to said Court. A copy of interlocutory injunction and absolute injunction, together with other papers shewing proceedings in the said Chancery Division. Renunciation by Andrew Monteith and Samuel Rankin. Petition of George Dickson. Affidavit of George Dickson verifying copy of will as true copy of will. Oath as to value of personal property. Affidavit of death.

“The will itself is not among the papers nor is there an affidavit of any one of the attesting witnesses proving the execution. I find no authority for the granting of administration on the material furnished. I am referred to the Surrogate Court for the will and the affidavit of execution by one of the witnesses to it, and renunciation by one of the executors named in the will. On search in the said Surrogate Court I find a document purporting to be the last will and testament of the said

late James Dickson filed among the papers in a suit in said Court, tried by a jury at the sitting of the County Court of Wellington, and the jury found it was not the will of James Dickson, and judgment has been entered thereon, and against such verdict and judgment there has been no appeal so far as I am aware, which appeal must be to the Court of Appeal, as provided by section 31, ch. 46, R. S. O. (The Surrogate Court Act.)

“Andrew Monteith and Samuel Rankin, two of the executors named in the said will, the other executor, John Dempsey, having renounced, made application for probate of the will. This application was opposed by Samuel Dickson, brother of the deceased, and an order made allowing a trial by jury.

“The trial took place at the sitting of the County Court, as provided by sections 18 and 19 of the said Surrogate Act, and the jury found it was not the will of James Dickson.

“The plaintiffs, the executors, moved against the verdict; their application was refused. There was no appeal as provided by the 31st section of the Act. They allowed the verdict to stand, on which judgment has been entered. After the said finding of the jury and judgment, the executors renounced, and George Dickson makes this application for administration with the will annexed.

“Before I can grant administration with the will annexed, I must be satisfied that the will to be annexed, is the will of the late James Dickson, and the paper I am asked to order to be annexed as such will, is that which has been found by a jury not to be his will.

Two of the executors, Andrew Monteith and Samuel Rankin, acted by seeking probate of the will. They cannot, after being defeated in the contest, throw off their responsibility by renouncing and open the door for another to apply for administration with the will annexed, which is the same as applying for probate. If the executors were dissatisfied with the verdict and judgment against them, the 31st section of the Act directs how they could have tested the justice of the verdict, and if they did not feel that on the evidence adduced before the jury the verdict could be disturbed, (and I do not think it could) I hold I have no right, and, further, I have no power to set it at nought and take the paper sought to be established as the said will off the files of the Court, and order it to be annexed to letters of administration as the last will and testament of the late James Dickson.

“Had the proceedings in the Court of Chancery been taken before that in this Court and the will established there as the will of James Dickson, there could have been no opposition to the grant of probate in this Court, but the executors having proceeded, as they did, in this Court, and there being a verdict of the jury and judgment declaring the will not the will of James Dickson, and no appeal against such verdict as provided for by the statutes, I do not see how I can hold that the finding of the learned Judge in the proceedings in the Chancery Division in any way sets aside or affects the finding of the jury in this Court, and if it does not then clearly, I cannot, in the face of such verdict, declare that it is the will of James Dickson and grant administration with the will annexed.

“For these reasons I decline to entertain the application.”



On April 14th, 1887, an application was made on behalf of George Dickson to Judge Drew for an order holding that an appeal had been duly lodged, and asking him to certify the papers for the appeal, but the said Judge said he was clear there could be no appeal because there was no person to whom notice and a bond could be given, and he could not therefore certify the papers for an appeal, and could not see any other course open than an application for a mandamus.

Therefore a motion was made which resulted in the order to shew cause of October 5th, 1887.

On November 8th, 1887, the matter came up for argument before Proudfoot, J.

*MacLennan*, Q. C., for the Judge of the Surrogate Court. The remedy here has been misconceived. The proper course was to appeal. The Surrogate Court is not bound to grant administration to the first next of kin applying: R. S. O. ch. 46, secs. 18, 49; *Howell's Surrogate Court Practice*, p. 43. This Court had no jurisdiction to declare the will valid: *Wilson v. Wilson*, 24 Gr. at p. 394; *Allen v. McPherson*, 1 H. L. 191: R. S. O. ch. 40, sec. 41. p. 421. The jurisdiction is to be measured by jurisdiction as to deeds. There is no case of an action to have it declared that a deed is valid. As to the right of an appeal, see *Howell's Surrogate Court Practice*, p. 74, *seq.*

*Moss*, Q. C., for George Dickson. The Judge himself thought there was no remedy but by mandamus. The appeal was impossible because there was no one to whom the bond could be given. There was no opposition to the grant. See for cases of mandamus where a Judge refuses to exercise jurisdiction: *Re Simmonds and Dalton*, 12 O. R. 405, 517; *Re McCulloch*, 35 U. C. R. 449; *Mayor of Rochester v. The Queen*, E. B. & E. 1024.

November 6th, 1887. PROUDFOOT, J.—This was a summons calling upon the Judge of the Surrogate Court of the

county of Wellington, to shew cause why a *mandamus* should not issue to compel him to grant administration, with the will annexed of the testator, to George Dickson, one of his next of kin.

It appears, I think, that every thing necessary was done to entitle George Dickson to the administration. The will with affidavit of execution and all the necessary papers to procure administration were before the learned Judge.

The learned Judge refused to grant administration with the will annexed to George Dickson, because he found in the records of the Surrogate Court a judgment upon a verdict by a jury upon an issue directed by himself finding against the will. The plaintiff in the present suit was no party to that issue.

The facts seem to be that a verdict was found in that issue against the will, and a rule was taken out for a new trial. While that was pending the present action came on for a hearing before me, when I decided in favor of the will. This was appealed to the Chancery Division, when the judgment was affirmed.

After I had given judgment and had enjoined the defendants from taking any further proceedings in the issue from the Surrogate Court, the learned Judge gave judgment discharging the rule *nisi*. He says that judgment has been entered. John Jacobs swears that, after I had granted an injunction (he was solicitor for the plaintiff in the issue, and for the defendants in this action) he took no further steps in the matter and committed no breach of the injunction. If that be true, the learned Judge must have entered the judgment himself.

It was contended that the remedy was misconceived, and that there should have been an appeal to the Court of Appeal from the refusal of the learned Judge to grant administration under the 31st section of the Surrogate Act. But appeals under that section would appear to be granted only when some person contests the grant of administration. By the rule and orders of the Court

(*Howell's Surrogate Court Practice*, p. 84, *et seq.*) the bond for security for costs is to be given to the respondent. There is no respondent here. The bond and affidavits are to be filed, and notice given to the opposite party. There was here no one to give notice to. And after filing of the bond and affidavits and service of notice, the appeal shall be held by the Surrogate Court to be duly lodged.

The plaintiff was desirous of appealing from the refusal to grant administration, and applied to the Judge to allow a bond, but the learned Judge told him, and I think correctly, that there being no contestant, there could be no appeal, and himself suggested that the only remedy was by *mandamus*. And in this also I agree with him.

It was contended also that there was no jurisdiction in this Court to declare a will valid. In this case the Divisional Court has affirmed the judgment, and I have no jurisdiction to question it, even if inclined to do so. The jurisdiction of the Court seems to me quite clear, and I see no reason to alter or modify what I said in *Wilson v. Wilson*, 24 Gr. 394.

As, under the circumstances of this case, George Dickson has no other remedy, I think him entitled to the *mandamus*. It is the usual mode of requiring Judges of Inferior Courts to do justice according to the powers of their office.

A. H. F. L.

---

## [CHANCERY DIVISION.]

## STRUTHERS V. GLENNIE.

*Voluntary conveyance—Subsequent creditor—Antecedent debt—13 Eliz. ch. 5—Statute of Limitations.*

A subsequent creditor cannot uphold an action to set aside a voluntary conveyance under 13 Eliz. ch. 5, merely on the ground that a debt of prior date to the conveyance is still unpaid, if such prior debt has become barred by lapse of time.

THIS was an action brought by Robert C. Struthers against Ellen M. Glennie and Aaron S. Vail, claiming to have a certain conveyance of land from Aaron S. Vail to Ellen M. Glennie, declared void and set aside, as a voluntary conveyance against him under circumstances which sufficiently appear in the judgment.

The action came on for trial in London, on October 10th, 1887, before Boyd, C.

*S. H. Blake*, Q. C., and *Gibbons*, for the plaintiff.

*Meredith*, Q. C., and *C. H. Ivey*, for the defendants  
There is no pre-existing debt: *Freeman v. Pope*, L. R. 5 Ch. 538, shews what has to be proved. See also *Masuret v. Mitchell*, 26 Gr. 435. But the debt here is barred, and cannot be used to justify this action.

*Blake*, Q. C., in reply, referred to *McCall v. McDonald*, 13 S. C. R. 247. There is a debt still existing which existed at the time of the conveyance, and this is sufficient to avoid the deed under the statute of 13 Eliz. ch. 5.: *Workman v. Robb*, 28 Gr. 243, 7 A. R. 389. The Statute of Limitations does not extinguish the debt, it only bars the remedy. *Spirett v. Willows*, 13 D. J. & S. 293, 302, is not interfered with by *Freeman v. Pope*, L. R. 5 Ch. 538: *Kerr on Fraud*, 2nd ed., p. 180. See also *Jenkyn v. Vaughan*, 3 Drew. 419, 424. See *Kerr on Fraud*, 2nd ed., pp. 201-2, 243, 252; *Edwards v. Harben*, 2 I. R. 587.



October 26th, 1887. PROUDFOOT, J.—This was an action by a subsequent creditor to set aside a voluntary deed executed about five years before the debt to the creditor was incurred.

I determined at the trial that the deed was not impeachable on the ground of any fraud or fraudulent intent on the part of the debtor or of the grantee.

But it was contended for the plaintiff that there was a debt due at the date of the deed which has not been paid.

The debt was a note to a private banker for \$130 which fell due on November 1st, 1880, and for which some collateral notes were left in security. Upon these \$48.70 were realized. The balance has not been paid, and the remedy for it was barred by the Statute of Limitations before the commencement of this suit.

The debt to the suing creditor was incurred in or after April, 1886.

The reason that a subsequent creditor is allowed to maintain such an action *merely* on the ground of the settlor's indebtedness, is, that if a prior creditor set aside the settlement, a subsequent creditor would be entitled to participate *pro rata*, so that he has an equity to participate, and may bring his action to enforce that equity: *May on Fraudulent Dispositions of Property*, 2nd ed., p. 518. And if the antecedent creditor cannot impeach such settlement, neither can the subsequent creditor impeach it *merely* on account of the settlor's indebtedness to him: *ib.* 519. And again, the right of a creditor to set aside a deed under 13 Eliz. ch. 5, is a legal and not an equitable right. \* \* Until the right to recover the debt is barred by the Statutes of Limitation, the legal right to avoid the deed exists: *ib.* 184, citing *In re Maddever*, 27 Ch. D. 523. In that case the deed was made in 1871, the grantor being indebted to a creditor on a specialty, but for ten years the creditor took no effectual proceedings to impeach it. North, J., observes, p. 528: "The time might have arrived when the Statute of Limitations would be a bar, and of course when the debt was gone no proceedings

could be taken in respect of it." And upon appeal Baggallay, L. J., says: "But the plaintiffs had a legal right, and I do not see how that right can be lost by mere delay to enforce it, unless the delay is such as to cause a statutory bar." And Mr. May, in another page, p. 44, says: "Under the Stat. of Eliz. such settlement is liable to be impeached at any time until the legal right of the creditor is barred by the Statutes of Limitation." In *Freeman v. Pope*, L. R. 9 Eq. 206, 5 Ch. 538, 540, Sir W. M. James says at 9 Eq. p. 210, that a subsequent creditor has exactly the same right to file a bill as the prior creditor has; that is to say, the case is to be tried as if the prior and not the subsequent creditor were the plaintiff.

In some cases of a special character a trust for creditors may embrace those whose remedy is barred by the Statute of Limitations, for the debts subsist though the remedy is gone: but, as a general rule, a direction for payment of debts will not revive a debt barred by the Statute of Limitations, though the trustee or executor may have advertised for all creditors to come in and prove their debts: *Lewin on Trusts*, 7th ed., p. 471.

It is clear, also, that under a decree for the benefit of creditors a creditor whose debt has been barred by the Statute of Limitations is prevented by the statute from proving his debt before the Master: *Berrington v. Evans*, 1 Y. & C. (Exch.) 434.

As this action, therefore, is to be considered as the action of the prior creditor, and his remedy was put an end to by the Statute of Limitations, the present plaintiff can be in no better condition, and judgment must be for the defendants, and with costs.

A. H. F. L.

---

## [CHANCERY DIVISION.]

SMITH V. FAIR. (*Red Seal Case*).SMITH V. FAIR. (*Green Seal Case*).

*Trade-mark—Publici juris—Combination—Monogram seal—Comparison of English and Canadian trade-mark Acts—Definition of trade-mark—Colour—Registration before action—Account of profits—Prior user—User in foreign country—Assignment—Goodwill—Hypothetical defence 42 Vict. ch. 22 (D.), secs. 6, 8.*

Words which are separately *publici juris*, such as 'Red' and 'Seal,' when combined and applied to a specific manufacture may cease to be so, and may well be protected as trade-marks. Single or more letters may also form a trade-mark, and more especially when combined, woven, or introduced into a monogram.

A common seal of wax to be used on a cigar box is a good trade-mark within the terms of 42 Vic. ch. 22 (D.), the Trade-mark and Design Act, 1879.

The Dominion Trade-mark and Design Act, 1879, defines 'trade-mark' in more general and comprehensive terms than the English Act of 1883, 46 Vic. ch. 57, sec. 64, and some care must be used in considering English decisions.

Under the English Act a trade-mark may be registered in any colour, and the registration confers on the registered owner the exclusive right to use the same in that or any other colour, and *semble*, our own Act has as extensive an application.

The fact that a plaintiff has brought an action for infringement before registering his trade-mark, which action has therefore proved abortive, does not prevent him bringing another action after registering.

*Semble*, the inability to sue for the infringement of a trade-mark before registration only applies where the infringement has been done innocently, and not to the case of fraudulent imitation or forgery of trade-marks.

The account of profits in an action for infringement should not be confined to the period subsequent to registration, at any rate when the infringement has not been innocent.

By prior user the Trade-mark and Design Act, 1879, 42 Vic. ch. 22, sec. 6 (D.), means user before adoption by the registrant, not before registration.

User of a trade-mark in a foreign country is no justification for an infringement in the country where the action is brought.

There is no provision in our Trade-mark and Design Act, 1879, similar to sec. 70 of Imp. 46-47 Vic. ch. 57, which provides that a trade-mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods for which it has been registered.

*Quære*, whether hypothetical defences can be pleaded.

THESE were two actions brought by Albert Smith against Alexander Fair claiming an injunction to restrain alleged infringements by the defendant of the plaintiff's

trade-marks, and that all boxes or packages in the defendant's possession bearing the alleged imitation of the said trade-marks might be destroyed, and for an account of profits made by the defendant by such imitation, and payment thereof to the plaintiff, and for further relief. They were tried together.

The allegations in the pleadings and the evidence adduced are sufficiently set out in the judgments.

The actions came on for trial at the sittings of this Court in London, in March, 1886, when the argument was adjourned to Toronto, where it took place on October 25th 1887.

*W. R. Meredith*, Q. C., and *McBeth*, for the plaintiff.

*McMichael*, Q. C., and *H. M. Wilson*, for the defendant.

The following cases were cited on the argument: *Sebastian* on Trade-Marks, 2nd ed. pp. 38, 39, 105, 115, 203; *In re Arbens Application*, 35 Ch. D. 248; *Goodfellow v. Prince*, 35 Ch. D. 9; *In re James' Trade-Mark*, 33 Ch. D. 392; *Re Wood's Trade-Mark*, 32 Ch. D. 247; *In re Lyndon's Trade-Mark*, 32 Ch. D. 109; *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 434, 447; *In re Horsburgh & Co.'s Application*, 53 L. J. Ch. 237; *Lever v. Goodwin*, 36 Ch. D. 1; *Wragg's Trade-Mark*, 29 Ch. D. 551; *Barsalou v. Darling*, 9 S. C. R. 677; *Canada Publishing Co. v. Gage*, 11 S. C. R. 306; *Anglo-Swiss Condensed Milk Co. v. Metcalf*, 31 Ch. D. 454; *Johnston v. Orr Ewing*, 7 App. Cas. 219; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Re Worthington & Co.'s Trade-Mark*, 14 Ch. D. 8; *In re Hyde & Co.'s Trade-Mark*, 7 Ch. D. 724.

#### RED SEAL CASE.

November 9th, 1887. PROUDFOOT, J.—This action was brought to restrain the infringement of a trade-mark and for an account.

The plaintiff is a manufacturer of cigars carrying on business at London, Ontario, and the defendant is also a manufacturer of cigars doing business at Brantford,



The plaintiff in his statement of claim alleges that he is the proprietor of a special trade mark consisting, firstly, of a seal with portions of ribbon attached and the letters R.S. forming a monogram thereon, above, below, or beside it and the words *red seal*. The said seal and the said words are stamped, engraved, lithographed, or painted on the box or package containing cigars, or on a label or cover affixed or attached to such box or package; secondly, of a similar seal but made of wax or other composition with portions of ribbon attached and the letters R. S. in monogram thereon, which is affixed to the side or end of the box or package containing cigars.

The plaintiff has used that trade-mark continuously since September, 1880, and it has been adapted by him to a certain brand of cigars made and sold by him, and he has sold large quantities of cigars bearing that trade-mark, by reason whereof it is widely known in Canada, and the cigars have a high reputation and the trade-mark is valuable to the plaintiff, and he caused it to be registered in the proper office on December 22nd, 1885, under the Trade-Mark and Design Act of 1879, 42 Vic. ch. 22, (D.)

The plaintiff also alleges that in or about October, 1885, the defendant began to sell cigars made by him in boxes or packages bearing close imitations of the plaintiff's trade-mark, consisting firstly, of a seal with portions of ribbon attached and the letters "A. F. S." forming a monogram thereon, and the words "A. F. Seal" the said seal and the said words being lithographed on a label attached to the cover of the cigar box: and secondly, of a seal made of wax with portions of ribbon and the letters "A. F. S." forming a monogram thereon which is affixed to the end of the cigar box, and that the most important and conspicuous part of the plaintiff's trade-mark is the seal made of wax affixed to the end of the cigar box or package, and the seal made use of by the defendant on his cigar boxes is of the same size and colour and is almost a *fac simile* of the plaintiff's seal: that by these imitations the public are and will be deceived and led to purchase the cigars manufactured by

the defendant instead of those made by the plaintiff, whereby the plaintiff is injured.

The defendant denies that the plaintiff is proprietor of the trade-mark : and alleges that the plaintiff is not, within the meaning of the Trade-Mark Act, 1879, the proprietor of the trade-mark : the alleged trade-mark is not a trade-mark : the words " Red Seal " are vague, uncertain, and indefinite and not the subject of a trade-mark registration : the term " Red Seal " is not a trade-mark that can be specifically appropriated to any article of merchandise : the defendant denies infringement : sealing wax is a material in common use and the plaintiff has no exclusive right to its use on cigar boxes or otherwise : the public cannot be misled or deceived by the indicia used by the defendant to mistake them for the plaintiff's : the plaintiff does not shew that his trade-mark was registered before the alleged infringement.

The plaintiff produced the certificate of registration of December 22nd, 1885, of the Red Seal trade-mark to be stamped, engraved, lithographed, or painted on the cigar box, and also of the wax seal with the letters R. S. in monogram to be affixed to the side or end of the cigar box.

The evidence shews that the plaintiff used his red seal marks in October, 1880, on his cigar boxes, which is prior to the time that any other manufacturer used a red seal or medal as a mark on cigar boxes ; the earliest mentioned being I think, that of McKay, which was not earlier than July, 1881, and who discontinued it on being threatened with an action for infringement by the plaintiff.

The defendant insisted in various modes that the plaintiff's mark was not a trade-mark ; that he was not the owner of it &c., &c.

I think it a good trade-mark. The Trade Mark and Design Act of 1879 (D.) 42 Vic. ch. 22, sec. 8, defines trade-marks in the most comprehensive terms, as all marks, names, brands, labels, or other business devices for the purpose of distinguishing any manufacture no matter how applied, whether to the article or the box. This is much

more general than the definition of trade mark in the Imperial Statute of 1883, 46-47 Vic. ch. 57, sec. 64, (a) and some care must be used in considering decisions in the English Courts. The word *Red* and the word *Seal* may each be admitted to be *publici juris*, but when combined and applied to a specific manufacture they cease to be so and may well be protected as trade-marks. Single or more letters may also form a trade-mark and more especially when combined, woven, or intertwined into a monogram. Under the English Act, sec. 67, a trade-mark may be registered in any colour and the registration confers on the registered owner the exclusive right to use the same in that or any other colour, and I apprehend our Act has as extensive an application. In *Ransome v. Graham*, 51 L. J. Ch. 897, 47 L. T. 218, ploughs marked with letters "R. N." and an additional letter or numeral varied according to pattern or quality, were protected.

It was also contended that the seal having been in use before the plaintiff's registration rendered it invalid. I do not need to discuss the question whether prior user invalidates a trade-mark as in *Partlo v. Todd*, 11 O. R., 171, for there the user was prior to the plaintiff's adoption of the mark, but here it is in evidence the plaintiff was the first to use the Red Seal for cigar boxes, and the Statute of 1879, 42 Vic. ch. 22 (D.) sec. 6, only requires that it should not have been in use by any other person than himself before the plaintiff's adoption of it. Other persons may have used

(a) Imp. 46-47 Vic. ch. 57, sec. 64, is as follows:—

64 (1) For the purposes of this Act, a trade-mark must consist of, or contain at least one of the following essential particulars:—

(a) The name of an individual or firm printed, impressed, or woven in some particular or distinctive manner; or

(b) A written signature, or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or

(c) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

(2) There may be added to anyone or more of these particulars any letters, words, or figures, or combination of letters, words, or figures, or of any of them.

(3) Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark before August 13th, 1885, may be registered as a trade-mark under this part of this Act,

REF.

red seals after the plaintiff adopted it; that does not invalidate his right, though it may give a cause of action against them. The plaintiff, it seems, brought an action against the defendant before registering his mark, and my brother Ferguson considered he could not bring an action till registry, under the 4th section of the Act of 1879, 42 Vic. ch. 22, (D.); whereupon the plaintiff discontinued his proceedings, registered his mark, and brought this action. I do not think this prevents the plaintiff from now asserting his right under the registration.

The defendant denies that he has infringed the plaintiff's trade mark. Bearing in mind the cautions noted by *Sebastian* on Trade-Marks, 2nd ed., p. 119 *et seq.*, as to expert evidence, I think enough has been proved in this case to show that the defendant had used a mark only colourably differing from the plaintiff's, and that there is such reasonable probability of deception as to justify interference with the defendant, and the evidence seems to me to establish further that the defendant procured and used his design or mark with the knowledge of the plaintiff's prior user with the intention of participating in the reputation acquired by the "seal" cigars.

The defendant, in his evidence, said that Garney, his foreman, had been in the plaintiff's employment, and suggested getting up a "seal brand," as it was a good thing; and in September, 1885, the defendant began to use it. He also says there is value in the mark, a very nice style of box, and attractive. Beck, a witness for the defendant made the "seal" boxes for the defendant in September, 1885; he put on the wax and stamped the seals. This witness also gave evidence of having made a number of other, seal marks, but they were all subsequent to the adoption of the seal as a distinctive mark by the plaintiff. Beck says he saw Garney in Brantford, who told him they were getting up a new brand, "a seal," and Garney asked him if he made seals, when Beck told him he made them for Smith, the plaintiff, and thought he (Beck) would get into trouble making them. Garney was not examined.



The defendant says he heard of the "green seal," but not of the "red seal." In September, 1885, he also used a "gold seal," the label and stamp of this are very similar to the A. F. seal. From this evidence I think the defendant must be taken to have known of the red seal, as well as the green seal, and had his seal and label made to take advantage of the reputation the seal stamp had acquired.

It is true the seals of the defendant have not the same monogram as the plaintiffs, one being A. F. S., and the other G. S., the plaintiffs being R. S., and the labels inside the boxes, when examined, differ from the plaintiff's, but both have a circular stamp of a golden colour, which at night might easily be mistaken for the colour of the plaintiff's. The design on the top of the defendant's boxes differ from the plaintiff's when inspected.

The principal benefit is derived from the "seal." The plaintiff's cigars were known in the market as "seal" cigars. Wade, the plaintiff's book-keeper, says they had acquired a reputation under that brand. He says also that the defendant's seal is calculated to deceive buyers. He had been in a retail establishment, and buyers would ask for "seal," or "red seal," or "green seal." The most important resemblance in the marks of defendant to that of the plaintiff, is the round red seal—next the black monogram. At the distance of four feet the letters on the seal are not capable of being distinguished.

[The learned Judge then reviewed the evidence on each side as to the probability of buyers of cigars being deceived into taking the defendant's seal for the plaintiff's, and continued.]

In *McAndrew v. Bassett*, 4 D. J. & S. 380, 384, 385. Lord Westbury notices that the essential ingredients for constituting an infringement of the stamp or trade-mark would probably be found to be no other than these: first, that the mark has been applied by the plaintiff properly (that is to say), that he has not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is

actually a vendible article in the market; and thirdly, that the defendant, knowing that to be so, has imitated the mark for the purpose of passing in the market other articles of a similar description.

All these ingredients are to be found in the present case. The mark is suggested to the defendant by his foreman, who had been in the plaintiff's employment and knew of the plaintiff's mark, and if he did not know he is informed of it by the person who made the mark for the defendant. There is no evidence of the use of a red, or any other seal as a cigar mark in Canada before the plaintiff adopted it. Seals may have been used for that purpose in the United States and protected there by trade marks, but the case of the *Berliner Brauerei Gesellschaft Tivoli v. Knight*, W. N. for 1883, p. 70, shows that user of a trade-mark in a foreign country is no justification for an infringement in the country where the action is brought.

The plaintiff's mark involves no false representation. The plaintiff's mark on the cigar boxes has acquired a good reputation in the market, the defendant himself testifying to the value of the seal.

I see no reason for limiting the accounts of profits, &c., to the date of the registration. It might admit, perhaps, of a different consideration if the defendant had used the mark innocently. But that he has not done. And although the plaintiff might not be able to sue on the trade-mark till registered, he ought not to suffer the loss caused by the fraudulent infringement prior to the registry.

My brother Ferguson has held, I understand, that the plaintiff could not sue for an infringement of a trade-mark until it had been registered, and so it would appear under the Statute of 1879, 42 Vic. ch. 22, (D.), sec. 4, where the mark has been innocently used; but I think that section must be so qualified, for it contains a proviso that actions may be instituted for a fraudulent marking of merchandize in accordance with the 35 Vic. ch. 32 (D.), even in the absence of registration. The first section of this statute defines a trade-mark to include

every name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark, registered or unregistered, lawfully used by any person to denote any article of the production, or merchandise of such person, &c., in more ample terms than used in the Act of 1879.

The following sections to section 10 inclusive contain strongly penal enactments for a fraudulent imitation or forgery of such marks, but section 11 preserves the remedy at law notwithstanding the offence is made a misdemeanor and punishable by indictment.

But, independently of this statute it would seem that there is a remedy for a fraudulent infringement of marks that could not be registered: *Lever v. Goodwin*, 36 Ch. D. 1.

Assuming then, that the defendant's contention is correct that the plaintiff's mark was not one that could be registered, I think there is enough in the evidence before me to justify a judgment for the plaintiff, which I give with costs.

---

#### GREEN SEAL CASE.

This is an action similar to the last for infringement of a registered trade-mark of the plaintiff called "The Green Seal," which was registered in the proper office on the 15th September, 1879, and another trade-mark "The Seal Brand," registered by the plaintiff on the 1st September, 1880; and of another trade-mark consisting of a medal usually made in sealing wax or other composition, and the word "Medal" registered on the 11th of April, 1881, all of these to be applied to the sale of cigars.

The defences are generally the same as in the Red Seal case, with this addition, that the defendant alleged that the plaintiff pretends that he received the Green Seal trade-mark from Foxen and Newman, cigar manufacturers, in Detroit; and the defendant says, if any gift were so made, it is of no benefit to the plaintiff.

The defendant then, in paragraph 6 of the statement of defence, states, hypothetically, that if the plaintiff on registering the trade-mark forwarded to the Minister of Agriculture a drawing and description in duplicate of such trade-mark, with a declaration that it was not in use, to his knowledge, by any other person than himself at the time of his adoption thereof, and if on such declaration the said alleged trade-mark was granted, he deceived the Minister and the public, he should not be permitted to take advantage of his own fraud.

It may be doubtful whether a defence can be pleaded in this hypothetical manner, but it is unnecessary to decide that for the surmises are all contrary to the fact, as the plaintiff in his application for registry states that he verily believes the Green Seal mark to be his on account of having acquired it from Foxen and Newman whom he verily believed to be the original proprietors thereof.

The evidence taken in the Red Seal case it was agreed should be read in this suit so far as applicable, and it establishes similar facts in regard to the Green Seal and its imitations by the plaintiff as in the other, with this exception, that the defendant admits having known of the plaintiff's Green Seal before he used a seal; and also that the imitation is somewhat less marked in this than the other, as the seal is, or seems to be of a dark purple colour rather than green. The further evidence given in this case shews that between 4,000,000 and 5,000,000 cigars have been made by the plaintiff and sold with the Green Seal. The seal used by the defendant has the same monogram G. S. as the plaintiff's. The plaintiff's monogram consists of the initial letters of Green Seal, the defendant interprets his as the initial letters of Gold Seal.

The defendant contended that the assignment from Foxen & Newman to the plaintiff was of no effect as there could not be a trade-mark in gross, and it could not be assigned independent of a good will. The Imperial Statute 1883, 46 & 47 Vic. ch. 57, sec. 70, provides that a trade-mark when registered shall be assigned and transmitted



only in connection with the good-will of the business concerned in the particular goods for which it has been registered. There is no such provision in our Act of 1879, 42 Vic. ch. 22, (D.), and the 14th section provides generally that every registered trade-mark shall be assignable in law, and the assignment may be registered. There is no mention of good-will. It may readily be granted that it cannot exist in gross not attached to specific articles and that by a sale of the good-will of a business a trade-mark would pass.

But that does not apply to this case. Foxen & Newman had the seal registered as a trade-mark in the United States. Had they chosen they might have had it registered in Canada, and it would have been entitled to the protection of our law; it was so before the trade-mark statutes were made: *Collins Co. v. Brown*, 3 K. & J. 423; *Collins Co. v. Cowen*, 3 K. & J. 428, and it is so since, as in *Berliner Brauerei Gesellschaft Tivoli v. Knight*, W. N. 1883, p. 70. The mark had been extensively used by Foxen & Newman, and was no longer in gross, but attached to their manufactures, which they might at any moment import into Canada. The assignment of the right to use the mark in Canada was in truth a transfer of their good-will in the Canadian trade.

But besides it does not seem necessary for the plaintiff to rely on the assignment. If the *Berliner Case*, *supra*, be good law, it would have been sufficient for the plaintiff to declare that the mark was not used by any person in Canada when he adopted it. However, his right was clear when he candidly stated the prior user in the United States, and established the consent of the prior owners to his use of it: *Sebastian on Trade-Marks*, 2nd ed. at p. 75.

The evidence of J. Maclean, is, that he could not be deceived by the defendant's Gold Seal so as to take it for the plaintiff's, but an ordinary customer might be deceived by it. By gas-light the colour would not be so distinct.

S. Rothschild says that an ordinary consumer would not likely recollect colour, and would smoke either plaintiff's

or defendant's for a sealed cigar. Most retail sale of cigars is after dark, and colour would become indistinct. The seal and the shape is the main thing, the colour is not so important.

Rodener and Jos. Smith say that a consumer might be apt to be deceived.

S. Walsh, a bar-tender in the Tecumseh Hotel, establishes the value of the Green Seal, and sold some of the Gold Seal for Green Seal. He got the box of the Gold Seal from the plaintiff.

In this case, also, it seems to me that all the requisites mentioned by Lord Westbury, are to be found. The mark properly adopted by the plaintiff; the value of it in the trade; and the intentional infringement of it by the plaintiff.

The plaintiff also produced the certificate of registry of "The Seal Brand," dated September 1st, 1880. This is a plain round wax, red, with no stamp on it, but a legend on the top "The Seal Brand," to be applied to the sale of cigars, which the plaintiff claims to entitle him alone to use a seal on cigar boxes, and by the seals used by the defendant he has infringed it.

I think a plain seal of wax to be used on a cigar box is a good trade-mark within the terms of the statute. And I think that the use by the defendant of a seal with an impression or stamp on it is an infringement of the plaintiff's right, although there is no copying of the legend "The Seal Brand:" *Radde v. Norman*, L. R. 14 Eq. 348: *Davis v. Reid*, 17 Gr. 69, 74. The evidence shews very clearly that the seal is the essential part; that the plaintiff's cigars had obtained a reputation under the name of "seal cigars," and that it made no difference to the general class of purchasers whether there was a stamp on it or not.

No argument was directed, nor, so far as I can ascertain, any evidence adduced, to establish an infringement of the "Medal" mark.

Judgment is for the plaintiff as regards "The Green Seal" and "The Seal Brand," with costs.

The copy of the evidence left with me is so blotted and blurred that I could not read it; and I have had to rely upon my own notes taken at the hearing. And I direct the attention of the taxing officer to the matter.

A. H. F. L,

---

[CHANCERY DIVISION.]

LICENSE COMMISSIONERS FOR THE LICENSE DISTRICT OF  
FRONTENAC V. THE CORPORATION OF THE COUNTY OF  
FRONTENAC.

*Canada Temperance Act—Revision of Dominion Statutes—Constitutionality—Local and private matters in the Province—Municipal institutions—R. S. O. ch. 181—41 Vic. ch. 14, (O.)—44 Vic. ch. 27, (O.)—47 Vic. ch. 34, (O.)—B. N. A. Act, sec. 92, Items 4, 8, 16.*

The effect of the revision of the Statutes of Canada, brought into force by Royal Proclamation, March 1st, 1887, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity, and the adoption of the Canada Temperance Act by municipalities prior to that revision, has not been changed or interfered with by it.

The alterations made in the phraseology of the Act by the revision are not vital, and do not materially change its character or effect.

*Held*, also, that the Ontario Legislation, R. S. O. ch. 181, secs. 92, 93, 105, 106; 41 Vic. ch. 14, secs. 6, 8; 44 Vic. ch. 27, secs. 11, 12, 13, 14, 16; 47 Vic. ch. 34, sec. 34; 50 Vic. ch. 33, which represent a body of legislation relating to municipalities brought under the Canada Temperance Act, by which ways and means are provided for the enforcement of the Act by the application of local funds raised by local taxation or otherwise in the county, are not *ultra vires* of the Local Legislature; and that the plaintiffs were entitled to recover from the defendants the expenses of carrying out the provisions of the Temperance Act in the license district of F. formed out of a part of the county of F.

The general law as to prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the Province, within the meaning of B. N. A. Act, sec. 92, item 16, and it may be enforced through the medium of provincial officers, to be appointed and paid for according to provincial legislation under B. N. A. Act, 92, item 4.

The legislation in question might also fall within the scope of B. N. A. Act, sec. 92, item 8, as pertaining to municipal institutions in the Province.

*License Commissioners of Prince Edward v. County of Prince Edward*, 26 Gr. 452; *License Commissioners of the North Riding of the County of Norfolk v. The Corporation of Norfolk*, ARMOUR, J., Nov. 1st, 1887, (reported herewith,) concurred in.

A portion of the sum claimed in this action was alleged to be a deficit brought forward from the previous year. It appeared, however, that the amount was the whole sum estimated for that year.

*Held*, that this was a matter of form only, as it could be sued for as a substantive debt upon the estimates of the former year.

THIS was an action brought by the Board of License Commissioners for the License District of Frontenac, against the Corporation of the county of Frontenac, to recover \$861.82 and interest, alleged to be due from the defendants in respect of the expenses of the carrying out the provisions of the Canada Temperance Act of 1878, in the said License District, for the License year 1887-1888. The statement of claim alleged that the said Act was in force in the county of Frontenac wherein the said License District was situate: that the said expenses, including a deficit of \$447.73, for the license year 1886-7, as estimated by the said Board, was \$1,292.73, which estimate was approved by the Provincial Treasurer: that a copy of the said estimate and approval, together with a notice in writing by the said Board requesting payment of the proportion payable by said municipality, was served on the clerk of the municipality upon June 2nd, 1887: that it thereupon became the duty of the municipality within one month thereafter, to pay into the bank where the License fund was kept, to the credit of said fund, two-thirds of said estimate, to wit, the sum of \$861.82, but the said municipality has not paid the said sum, or any part thereof, and refuses to do so; and the plaintiffs claimed a declaration that they were entitled to be forthwith paid the said sum of \$861.82, and interest and costs of suit.

By their statement of defence the defendants denied the allegations in the statement of claim, and denied that they were liable to pay any part of the said expenses, and alleged that they could not lawfully levy a rate, or otherwise lawfully provide for the same: that they were not compellable to pay any part of the said alleged expenses, unless they so decided, which they had not done: that there was no License Fund for the said License District: that they admitted that a sum of \$150 represented to be fines imposed and collected for breaches of the second part of the Act had been paid to their treasurer and received by him without their privity or consent, and which sum was paid to the treasurer without lawful authority, and which sum they now brought



into Court for the disposal of the Court: that if they were liable for any part of the said alleged expenses it was only for a one-third part of any fines or penalties for breaches of the second part of the Act received by them during the said license years: that the License District of Frontenac comprises a part only of the municipality of Frontenac, and the alleged expenses were not incurred for any purpose of the said municipality, and a rate to pay the same would have to be levied from the ratepayers of the whole municipality, and they, the defendants, could not lawfully levy such a rate: that the said estimates were not estimated, made, or approved, or notice thereof served, or payment thereof demanded according to law, and that the expenses estimated for thereon were not, nor are they lawfully authorized expenses: that the plaintiffs' proceedings, including this action, have been and are taken under the supposed authority of certain Ontario Acts, being R. S. O. ch. 181, secs. 92, 93, 105, and 106, as amended by 41 Vic. ch. 14, sec. 6 and 8, as amended by 44 Vic. ch. 27, secs. 11, 12, 13, 14 and 16; 47 Vic. ch. 34, sec. 34, and 50 Vic. c. 33, relating to the enforcement of the second part of the said Canada Temperance Act, the appointment of commissioners and officers for such enforcement, the making and approval of estimates of the expenses of such enforcement, and notifying the same and imposing the duty or liability upon municipalities to pay a proportion of the expenses of such enforcement of the said second part of the said Act, and authorizing a demand thereof, and the bringing of an action upon nonpayment of the same to recover such proportion, and that such Acts are beyond the competence of the said Legislature to enact, and the same are *ultra vires* of the said Legislature and void: that as to the proportion of two-thirds of the sum of \$447.73, claimed as a deficit from the license year, 1886-7, they deny that the said sum is a deficit from the said license year as alleged, and say that it is the whole estimate estimated as the expenses of the said license year required, and the said proportion of the said sum should have been proceeded for and collected in

the said license year, and the ratepayers of the said municipality in the present year were not liable to pay the same, and the same was unlawfully included in the estimate for the license year 1887-8; and that as to the portion of the plaintiff's said alleged claim for, and represented by, the period from and after March 1st, 1887, the Canada Temperance Act of 1878, which is the Act referred to in the Ontario Acts above mentioned, was repealed on March 1st, 1887, by 49 Vic. ch. 4 (D.), and ceased to be in force from the said day in the county of Frontenac, and the Consolidated Act substituted for the said Act, differs from the same, and requires to be adopted in the said county before it shall be in force therein; and that it had not been so adopted, and was not in force in the said county, and the estimate mentioned in the statement of claim, and the proceedings connected therewith are so far void and of non-effect, having been made and taken after the said Canada Temperance Act had been so repealed as aforesaid, and no recovery could be had by virtue thereof.

The action came on for trial on November 10th, 1887, before Boyd, C., at Kingston.

*Britton*, Q. C., for the plaintiffs.

*Walkem*: Q. C., and *Agnew*, for the defendants.

The arguments adduced, are indicated in the judgment.

The following cases were cited in the argument: *License Commissioners of Prince Edward v. County of Prince Edward*, 26 Gr. 452; *Scott v. The Corporation of the Town of Peterborough*, 19 U. C. R. 469; and the decision of *Armour, J., License Commissioners v. Norfolk*, November 1st, 1887, see *infra*.

November 22nd, 1887. *BOYD, C.*—The Canada Temperance Act 41 Vic. ch. 16, (D.,) is (with the exception of one or

two minor parts) said to be "consolidated" in the new revision of the Dominion Statute (see vol. ii. of the Revision, Appendix i. p. 2422.) The manner of consolidation is shewn in the same volume: Appendix ii. p. 2474. In Schedule A of the 2nd vol. p. 2289, this Act is classed as "repealed," *i. e.* from the date of the coming into force of the Revised Statutes of Canada (see p. 2247). The new Revised Statutes came into force by Royal proclamation on March 1st, 1887 (50-51 Vic., Orders in Council cexix.) The purpose of the revision was to revise, classify, and consolidate the public general statutes of the Dominion, and the repeal of the old statutes incorporated in the revision was rather for convenience of citation and reference by giving a new starting point than with a view of abrogating the former law. That is manifest from a study of the scope of 49 Vic. ch. 4, (D.), respecting the Revised Statutes of Canada. Sec. 5, sub-sec. 2, provides for the repeal of the Acts mentioned in Schedule A above mentioned. But this repeal is not to affect any matter pending at the time of repeal (sec. 7). By sec. 8 the Revised Statutes are not to be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law in the Acts repealed for which the Revised Statutes are substituted; but if on any point the provisions of the revision are not in effect the same as the earlier Acts, then the revision shall prevail as to all matters subsequent to their taking effect, and as to all prior matters the provisions of the repealed Acts remain in force. See also Interpretation Act, R. S. C., ch. 1, sec. 7 (51.) The effect of the revision, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity. The point in hand was long ago passed upon by a jurist of highest repute, Shaw, C. J., in *Wright v. Oakley*, 5 Met. (Mass.) at p. 406, from which I quote his words: "In terms, the whole body of the Statute law was repealed; but these repeals went into operation simultaneously with the Revised Statutes, which were substituted for them, and were intended to replace

them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing Act stood in force, without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and the re-enactment of new ones."

This canon of construction was accepted by the Supreme Court of the United States in *Steamship Co. v. Joliffe*, 2 Wall. at p. 456, and has been uniformly recognised throughout the American Courts: See decision of the Chancellor, in *Middleton v. New Jersey West Line R. W. Co.*, 11 C. E. Green at p. 273, affirmed in appeal (*sub nom.*) *Randolph v. Larned*, 12 *ib.* at p. 562, and *State v. Gumber*, 37 Wis. at p. 303. The adoption, therefore, of the Canada Temperance Act by the municipality of Frontenac has not been changed or interfered with by the revision of the statutes. The alterations made in the phraseology of the Act (many of which have been pointed out by Mr. Agnew) are not vital, and do not materially change its character or effect.

The scope and effect of the statute as a prohibitory measure remains substantially the same, and I can find no good reason for saying that the county is exempt from its operation.

It is urged that the Ontario legislation, in virtue of which this action is brought, is *ultra vires* and void. The statutes in question are R. S. O. ch. 181, secs. 92, 93, 105, and 106, as amended by 41 Vic. ch. 14, secs. 6 and 8; 44 Vic. ch. 27, secs. 11, 12, 13, 14, and 16; 47 Vic. ch. 34, sec. 34, and 50 Vic. ch. 33. These represent a body of legislation relating to municipalities brought under the Temperance Act, by which ways and means are provided for the enforcement of the Act by the application of local funds raised by local taxation, or otherwise, in the county. It was said that these laws were impolitic, unphilosophical, and unjust; and that the machinery thereby created was unworkable. But the sole matter for my consideration is,



whether this legislation is of the proper competence of the Province in view of the provisions of the British North America Act. All other matters as to sound or unsound principles, wise or unwise political scope, are for the electorate and their representatives in Legislature assembled.

All the preliminaries required by the Ontario Statutes appear to have been observed. The license commissioners are appointed for a district somewhat less than the whole county of Frontenac, but no part of their district, is outside of that municipality. The objection that the whole area of the county is to be taxed for this license district, is not one affecting the power of this Province so to legislate.

As stated by Sir Montague E. Smith, in *Russell v. The Queen*, 7 App. Cas. at p. 835 : the effect of the Canada Temperance Act, when brought into force in any County, is to prohibit the sale of intoxicating liquors except in wholesale quantities or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors in violation of the prohibitions and regulations contained in the Act, criminal offences punishable by fine, and for the third or subsequent offence by imprisonment. Now the Act is brought into force in any municipality by a majority of the votes of the therein qualified electors, and when so introduced it becomes a part of the municipal law relating to public order, safety and good government in that locality. The general law as to prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the Province within the meaning of the British North America Act, sec. 92, item 16.

The enforcement of the Act in the adopting municipalities involves questions of local police regulation. For the purpose of ensuring uniformity and efficiency of action, the prosecution of offenders may be properly relegated to the hands of provincial officers for the appointment and payment and governance of whom laws may be made under British North America Act, sec. 92, item 4. The expense

of carrying the Act into effect within the adopting county is a burden to be borne by the ratepayers of that locality, so that the legislation now questioned may also fall within the scope of the British North America Act, sec. 92, item 8, as pertaining to municipal institutions in the Province. This body of Ontario legislation is not in conflict or competition with the provisions of the general law enacted by the Dominion, but in furtherance of it as to its local application and details. Legislation for the well-being of the municipalities in order to the fair and equal enforcement of the prohibitory measures introduced by themselves does not to me appear to be *ultra vires* of the Province, even though in one aspect it be supplementary to the general legislation of the Dominion on that subject. In my opinion each Province is competent so to legislate, if not restricted by any constitutional limitation embodied in or deducible from the British North America Act, and such limitation I have been unable to discover. My conclusion then in brief is, that the general prohibitory law, being localized by municipal option, may be enforced through the medium of Provincial officers to be appointed and paid for according to Provincial legislation (*Richardson v. Ransom*, 10 O. R. at p. 392).

It was also contended that the estimates were not approved of by the proper officer, but only by his deputy. The estimates, however, bear the signatures of the Provincial Secretary, and of Mr. Totten, acting for the Provincial Treasurer.

By 41 Vic. ch. 14, sec. 6, sub-sec. 2 (O.), the estimate of the License Commissioners was to be approved of by the Provincial Treasurer. This duty was, however, by order in Council of July 20th, 1883, transferred to the Provincial Secretary, as authorized by R. S. O. ch. 14. sec. 3. We have in fact, therefore, this estimate sanctioned by the deputy of the Provincial Treasurer and by the Provincial Secretary in person. The approval or audit of the estimates was regarded as an administrative act that might be delegated, by Spragge, C., in *License Commissioners of Prince*

*Edward v. County of Prince Edward*, 26 Gr. at p. 457, and if so, there is no doubt the sanction of the deputy was sufficient (see Interpretation Act R. S. O. ch. 1, sec. 8, sub-sec. 26, p. 8.) But without this, there is the proper signature of the Provincial Secretary which concludes the matter, and there is no evidence to contradict its finality.

An argument was made as to the arrears brought forward from the former year (1886-7) as "a deficiency." It appears that this was the whole sum estimated for that year, and that it was not diminished by any receipts for any sum, so as to reduce it to a deficit in the usual sense. But after all, that is but a matter of form, as it could be sued for as a substantive debt upon the estimates of the former year.

The main matters now under consideration have been disposed of in the same way as I have done, in the case *License Commissioners of Prince Edward v. County of Prince Edward*, 26 Gr. 452, and again by my brother Armour (a) in the *License Commissioners of the United District of the North Riding of the County of Norfolk v. The Corporation of the County of Norfolk*, (Nov. 1st, 1887;) but I was asked to give an independent judgment upon the points urged, and this I have endeavoured succinctly to do.

The result is, that judgment should be for the plaintiffs, with costs.

A. H. F. L.

(a) The judgment of Mr. Justice Armour referred to was as follows :

November 1st, 1887. ARMOUR, J.—It was admitted that the second part of the Canada Temperance Act of 1878 had been, and but for the Revision of the Statutes, still was in force in the county of Norfolk, and it was contended that having been in force only by vote of the people, and having been repealed by 49 Vic. ch. 4, sec. 5, and appearing in the Revised Statutes in an altered form it could no longer be held to be in force.

I have already given my opinion that when the people voted to bring the second part of the Canada Temperance Act of 1878 into force, it became as to them as any other Act which did not require such vote, and was so brought into force subject to any amendment the Legislature might thereafter see fit to make therein. I have also given my opinion

that the effect of the Statute 49 Vic. ch. 4, read with the Interpretation Act, was to preserve the Canada Temperance Act of 1878, in force in its revised form.

The Chief Justice of the Queen's Bench Division has also given a like opinion, and I see no reason to depart from it.

It was admitted that the Board of License Commissioners comprised the same persons for the North Riding as for the South Riding, and that the Boards were properly constituted.

The two Electoral Districts of the North and South Ridings of Norfolk comprise the whole county of Norfolk, and no territory outside of that county.

The estimates made by the Boards were served upon the Clerk of the defendant corporation, and the amounts thereof demanded, such estimates having been previously approved by the Provincial Secretary under his own hand, and the prescribed time after such service and demand had elapsed before suit.

I have been unable, after a critical examination of the Statutes referred to and bearing on the question, to find any ground of defence to the suits.

---



A DIGEST  
OF  
ALL THE CASES REPORTED IN THIS VOLUME  
BEING DECISIONS IN THE  
QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY  
DIVISIONS.  
OF THE  
HIGH COURT OF JUSTICE FOR ONTARIO.

---

**ACCOMPLICES.**

*Evidence of.*]—See EVIDENCE, 2.

---

**ACTION.**

*Cause of.*]—See DEFAMATION, 2.

*Stay of.*]—See FRAUDS, STATUTE OF

---

**ADMINISTRATION.**

See PARENT AND CHILD.

---

**ADMISSIONS.**

See RECOVERY OF LAND.

---

**ADVANCEMENT.**

See PARENT AND CHILD.  
95—VOL. XIV. O.R.

**ADVERTISEMENT.**

See RECOVERY OF LAND.

---

**ALIENATION.**

*Restraint on.*]—See WILL, 2.

---

**APPOINTMENT.**

See WILL, 6.

---

**APPORTIONMENT.**

See LANDLORD AND TENANT.

---

**APPROPRIATION OF PAY-  
MENTS.**

See LIMITATIONS, STATUTE OF.

**ARBITRATION AND AWARD.**

See MUNICIPAL CORPORATIONS, 2.

**ASSESSMENT AND TAXES.**

See MUNICIPAL CORPORATIONS, 4.

**ASSIGNMENT.**

*Of claim.*—See COMPANY.

**BAGGAGE.**

See RAILWAYS AND RAILWAY COMPANIES, 4.

**BANKRUPTCY AND INSOLVENCY.**

1. *Fraudulent preference*—"Insolvent," meaning of—*R. S. O. ch. 118—48 Vic. ch. 26, sec. 2, (O).*—A man may be deemed insolvent within the meaning of *R. S. O. ch. 118*, as amended by *48 Vic. ch. 26, sec. 2 (O)*, if he does not pay his way and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

*Rae v. McDonald*, 13 O. R. 352, discussed.

*Held*, [affirming the decision of *O'Connor J.*], that under the circumstances of this case, a certain assignment of book debts made by *J. M.* to the defendants was made by him when in insolvent circumstances and was void as against the plaintiffs under the above enactments. *War-nock v. Kleopfer*, 288.

2. *Evidence of insolvency*—"Insolvent circumstances"—*48 Vic. ch. 26 (O)—Preference.*—On the 19th December, 1885, a transfer of certain book debts was made by the firm of *B. M. & Co.*, to defendant, under a contract therefor, made on the 16th August, 1884, whereby defendant lent the firm \$15,000, which was to be repaid on six months notice, and defendant to be employed as a clerk at \$2,000 a year. The firm subsequently made an assignment, under *48 Vic. ch. 26, (O)*, to the plaintiff, for the benefit of their creditors. The plaintiff claimed that at the time of the transfer the firm was insolvent, and therefore the transfer was invalid as giving, or having the effect of giving, the defendant a preference. At the time of the transfer the value of the firm's stock of goods at the ordinary selling value was nearly double the amount of the firm's liabilities; but when they were sold by the plaintiff, some two months afterwards, they only realized a third of the ordinary selling price, and much less than the liabilities.

*Held*, that the firm were not insolvent at the time of the transfer; and the transfer was therefore valid. *Clarkson v. Sterling*, 460.

3. *Evidence of insolvency*—"Insolvency"—"Unable to pay debts in full" and "insolvent circumstances," Meaning of—*Assets under mortgage or warehouse receipts, effect of.*—Under a judgment recovered and execution issued thereon in February, 1887, certain goods and chattels of *C.* were seized. These goods were covered by a chattel mortgage made on the 18th December, 1886, in favor of the defendant. The evidence shewed that at the time of the mortgage there was a surplus of about

\$13,000 of assets over liabilities. All the assets were either mortgaged or under warehouse receipts.

*Held*, that C. could not be deemed to be insolvent at the time of the making of the mortgage within 48 Vic. ch. 26, (O).

There is no wider meaning to be given to the words "unable to pay his debts in full" than to "insolvent circumstances"; but both expressions refer to the same financial condition, that is, to a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted.

The fact that all the assets were either mortgaged or under warehouse receipts is not alone sufficient to render a debtor insolvent. *Dominion Bank v. Cowan*, 465.

See VOLUNTARY CONVEYANCE.

## BANKS AND BANKING.

*Non-negotiable deposit receipt—Fraudulent receipt of the money—Laches—Notice—Estoppel by conduct.*—The plaintiff, an ignorant man and a foreigner, deposited a sum of money with the defendants on 24th September, 1884, and received from them a non-negotiable deposit receipt for the amount, in which it was stated that the defendants would "account to" the plaintiff therefor, &c. At the same time the plaintiff's signature was left with the defendants for the purpose of identification. The plaintiff left the receipt with one S. S., for safe keeping, and went away. He returned in April, 1885, when S. S. informed him that he had drawn the money

and promised to return it. The defendants had paid the money without proper identification, and without comparison of the signature of S. S. with that of the plaintiff. Ignorant of the method by which the money had been obtained and of his rights against the defendants, the plaintiff did nothing further, and S. S. left the country in August following, heavily indebted. Subsequently, in December of the same year the plaintiff was informed of his rights, and consulted a solicitor, who promised to attend to the matter, but failed to do so. In April, 1886, the plaintiff consulted another solicitor when a demand was made on the defendants, and on their refusal this action was brought. This demand was the first intimation to the defendants of the fraud practiced on them.

*Held*, [reversing the judgment of ARMOUR, J., at the trial] that as the plaintiff's delay was not suggestive of collusion or of any unfair dealing on his part, his failure to make a demand or sue the defendants, when he first heard his money had been obtained by S. S., did not operate against him as his claim was not barred by the Statute of Limitations.

*Held*, also, that no legal duty was cast on the plaintiff to notify the defendants, and thus an essential element of estoppel by conduct was absent.

*Merchants Bank v. Lucas*, 13 O. R. 540, distinguished. *Saderquist v. Ontario Bank*, 586.

## BIGAMY.

See CRIMINAL LAW, 2.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Partial failure of consideration—Parol agreement to reduce face value of note by liquidated amount—Endorsement after maturity.*—The defendant purchased the stock in trade of one C. for \$5,500, and an agreement under seal was executed by the parties whereby the defendants covenanted to pay the said sum. The agreement also provided that a portion of the consideration should be secured by four promissory notes of \$1100 each. After the last note had become due C. endorsed it "without recourse" to the plaintiff. To an action on the note the defendants pleaded that the value of the goods had been misrepresented to them by C., and that before said note had become due C. agreed to allow a reduction of \$500 from its face value; and that plaintiff took the note after it had become due. They paid \$626.50 into Court, being the balance due on the note with interest.

At the trial the plaintiff, in his evidence, admitted that he did not claim to occupy any different position from C. The defendants' evidence shewed a verbal agreement to make the reduction of \$500, but C. swore he had never made the agreement. The Judge at the trial found that C. had promised to make the reduction, and that the plaintiff stood in the same position as C., and he dismissed the action with costs.

*Held*, that the defendants had a right to enforce the agreement for the allowance of \$500, there being a partial failure of consideration for an ascertained and liquidated amount. *McGregor v. Bishop et al.*, 7.

2. *Indorser—Principal and surety—Agreement to extend time—Reser-*

*vation of rights against sureties—Agreement as to assigning securities—Release of endorser.*—The holders of certain promissory notes agreed with the maker thereof, and certain of the endorsers, to extend the time for payment. The agreement expressly reserved all rights and remedies against persons other than parties to the agreement.

*Held*, that under these circumstances a subsequent endorser, not privy to the said agreement, was nevertheless not released thereby, for that his rights against the maker and prior endorsers were not prejudiced, inasmuch as the reservation of the rights of the holder against him, involved the reservation of his rights against the others.

*Held*, also, that the fact that the agreement also provided that upon payment and satisfaction of the holders certain collateral securities were to be assigned to one of the other parties to the agreement did not discharge the subsequent endorser, for the said arrangement was not absolute but limited to those who were parties between it as to themselves only, and it did not effect the subsequent endorser's claim to the possession of the said securities if he paid the holders. *Canadian Bank of Commerce v. Northwood*, 207.

See PARENT AND CHILD.—PARTNERSHIP, 1.

## BILL OF LADING.

*Rate of freight—"Dangers of navigation excepted"—Damage—Sale of cargo—Deductions.*—A schooner, carrying coal late in the autumn of 1883, from S. to K. was damaged by stress of weather. The cargo was unloaded to repair the vessel, and the coal



could not be delivered before the spring of 1884. The bill of lading stated that the rate of freight to be \$1.50 a ton, but if the coal were not delivered in the season of 1883 the freight was to be at the going rates when the coal was delivered, "the dangers of navigation, fire, and collision excepted."

On the arrival of the schooner at K. the master tendered the coal to the consignees who refused to accept it, disclaiming all title thereto, and contending that the consignors or insurers must take it. The master, too, refused to deliver unless upon payment of a larger rate of freight than that then prevailing. After ten days delay the coal was, by consent of parties, unloaded on the consignees' wharf, they receiving it as wharfingers. It was afterwards sold by consent of parties and was purchased on behalf of the consignees.

*Held*, that the exception of the dangers of navigation did not apply to the rate of freight in any way, but to the safe delivery of the cargo; and that the defendants were only entitled to the rate of freight prevailing at the time of delivery.

*Held*, also, that the plaintiffs having repudiated the ownership and refused acceptance of the coal, the defendants were entitled to damages for the delay in unloading, and also, in addition to the freight, to charges for unloading, selling, and delivering the coal. *Canadian Locomotive Co. v. Copeland et al.*, 170.

### BOND.

*See* REPLEVIN.

### BUILDINGS.

*See* CROWN LANDS—INSURANCE, 3.

## BUILDING CONTRACT.

*See* WORK AND LABOR.

### BY-LAW.

*See* MUNICIPAL CORPORATIONS, 1, 2, 4.

## CANADA TEMPERANCE ACT, 1878.

1.—*Defendant deprived of right of making full defence — Interest of magistrate — Calling magistrate as witness — Names of magistrates in summons.*—1. On a prosecution under the Canada Temperance Act for selling liquor the information on its face purported to be laid before D. and A., two justices of the peace, and both signed the summons. The summons to the defendant was to appear before two justices of the peace for the county as may be there to answer the information &c. The hearing was before D. and A. It was claimed that C. and M. were members of an association for the enforcement of the Act, and that they were instrumental in laying the charge and in selecting the magistrates; and that A. was also a member of the association and had been present at a meeting thereof. At the hearing S., the license inspector who had laid the information, gave evidence in support of the charge. On cross-examination he was asked whether the license commissioners were consulted before laying the charge, whether he laid it of his own accord or had consulted with any person outside of the commissioners; his reason for suspecting and believing that liquor was sold &c.? Whom did he see before laying the information? Did he see

A., C., or M.? Had C. and M. anything to do with the selection of the magistrates &c.? The magistrates ruled that he was not bound to answer the questions, and he refused to do so. For the defence, with the alleged view of shewing the interest of A., he was called as a witness, but he refused to be sworn and give evidence. The defendant was convicted.

*Held*, that the justices properly refused to allow the disclosure of the source of information on which the complaint was founded, but by their refusal to allow the cross-examination of S. in reference to his communication with A. and the other alleged members of the association, and in refusing to allow A. to be sworn as a witness, the defendant was deprived of the right of making a full defence as authorized by sec. 30 of 32 & 33 Vic. ch. 31 (D.); and the conviction therefore could not be maintained, and must be quashed.

The calling of a magistrate, sitting on a case as a witness, does not of itself disqualify him from further acting in the case.

The omission of the names of the justices from the summons was held to be no objection as the complaint was tried before the justices before whom the information was laid.

*Regina v. Ramsay*, 11 O. R. 210, distinguished. *Regina v. Sproule*, 375.

2. *Defendant summoned to appear before one justice—Charge laid before two justices—Appearing on summons—Waiver—Necessity to state absence, &c., in conviction of justices before whom charge laid—Week—Computation of time.*—The summons for an offence under the Canada Temperance Act 1878, stated that the defendant was charged with offence before one justice. The in-

formation was laid before two justices, one of whom issued the summons. The defendant appeared on the summons, when two justices were present, and cross-examined the witnesses for the Crown, and called witnesses on his own behalf.

*Held*, that the fact of so issuing the summons was a mere irregularity, which was waived by appearing on the summons.

*Held*, also, that the justices before whom the case was to be tried, need not be named in the summons.

*Held*, also, an objection that the conviction did not shew upon its face the absence of either of the justices before whom the information was laid, nor the assent of the other that another justice should act or take part in the prosecution, was one of form merely, against which secs. 117, 118 sufficiently provided; and, even without the aid of such sections, it was doubtful whether the objection could prevail.

Sec. 46 provides that the hearing may be adjourned to a certain time and place, but no such adjournment shall be for more than a week.

*Held*, that the week must be computed as seven days exclusive of the day of adjournment. *Regina v. Collins*; *Regina v. Goulais*, 613.

3. *R. S. C. ch. 106—Information before two justices—Summons signed by one—R. S. C. ch. 178, sec. 28—49 Vict. ch. 4, sec. 7 (D).*—A summons under the Canada Temperance Act, 1878 recited the information, which was taken by two justices, to have been "laid before the undersigned," who was one of the justices only, and required the defendant to appear before him, or before the justice who should be at the time and place named to hear the complaint. The

information and conviction were drawn up for an offence against the Canada Temperance Act, 1878, while the Revised Statutes of Canada were in force before and at the time of the information and proceedings thereon were had. An offence was proved to have been committed both before and after the Revised Statutes came in force.

*Held*, that the name of the justice who was not a party to the summons need not be stated in it.

*Regina v. Ramsay*, 11 O. R. 210, not followed on this point.

*Held*, also, that although the summons did not conform to the facts, yet, as the two justices who took the information were both present at the hearing, and the defendant was convicted on the merits, the objection to the summons was not entitled to prevail under R. S. C. ch. 178, sec. 28.

*Held*, lastly, that the charge as laid and proved must be treated as if under the original Act, which by 49 Vic. ch. 4, sec. 7 (D.) was not absolutely repealed so as to effect any penalty, &c., incurred before the time of such repeal. *Regina v. Durnion*, 672.

4. *Revision of Dominion Statutes—Constitutionality—Local and private matters in the Province—Municipal institutions*—R. S. O. ch. 181—41 Vic. ch. 14, (O.)—44 Vic. ch. 27, (O.)—47 Vic. ch. 34, (O.)—B. N. A. Act, sec. 92, Items, 4, 8, 16.]—The effect of the revision of the Statutes of Canada, brought into force by Royal Proclamation, March 1st, 1887, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity, and the adoption of the Canada Temperance Act by municipalities prior to

that revision, has not been changed or interfered with by it.

The alterations made in the phraseology of the Act by the revision are not vital, and do not materially change its character or effect.

*Held*, also, that the Ontario Legislation, R. S. O. ch. 181, secs. 92, 93, 105, 106; 41 Vic. ch. 14, secs. 6, 8; 44 Vic. ch. 27, secs. 11, 12, 13, 14, 16; 47 Vic. ch. 34, sec. 34; 50 Vic. ch. 33, which represent a body of legislation relating to municipalities brought under the Canada Temperance Act by municipalities by which ways and means are provided for the enforcement of the Act by the application of local funds raised by local taxation or otherwise in the county, are not *ultra vires* of the Local Legislature; and that the plaintiffs were entitled to recover from the defendants the expenses of carrying out the provisions of the Temperance Act in the license district of F. formed out of a part of the county of F.

The general law as to prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the Province, within the meaning of B. N. A. Act, sec. 72, item 16, and it may be enforced through the medium of provincial officers, to be appointed and paid for according to provincial legislation under B. N. A. Act sec., 92, item 4.

The legislation in question might also fall within the scope of B. N. A. Act, sec. 92, item 8, as pertaining to Municipal institutions in the Province.

*License Commissioners of Prince Edward v. County of Prince Edward*, 26 Gr. 452; *License Commissioners of the North Riding of the County of*

*Norfolk v. The Corporation of Norfolk.* ARMOUR, J., Nov. 1st, 1887, (reported herewith,) concurred in.

A portion of the sum claimed in this action was alleged to be a deficit brought forward from the previous year. It appeared, however, that the amount was the whole sum estimated for that year.

*Held*, that this was a matter of form only, as it could be sued for as a substantive debt upon the estimates of the former year. *License Commissioners of Frontenac v. Corporation of Frontenac*, 741.

### CANCELLATION.

See FRAUD AND MISREPRESENTATION.

### CARGO.

*Sale of.*—See BILL OF LADING.

### CASES.

*Borthwick v. Young*, 12 A.R. 671, distinguished.] See SALE OF GOODS.

*Brownlie v. Campbell*, 5 App. Cas. 925, distinguished.] See FRAUD AND MISREPRESENTATION.

*Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. followed.] See INSURANCE, 2.

*Clouse v. Canada Southern R. W. Co.*, 4. O. R. 28, 11 A. R. 287, 13 S. C. R. 139, distinguished.] See RAILWAYS AND RAILWAY COMPANIES, 3.

*Corporation of Dover v. Corporation of Chatham*, 12 S. C. R. 321, commented on.] See MUNICIPAL CORPORATIONS, 3.

*Eldorado Union Store Co. Re.*, 6 Russ. and Geld. 314, followed.] See CONSTITUTIONAL LAW.

*Fawcett v. Great Western R. W. Co.*, 1 Moo. P. C. N. S. 101, followed.] See RAILWAYS AND RAILWAY COMPANIES, 4.

*Hart v. Swaine*, 7 Ch. D. 42, distinguished.] See FRAUD AND MISREPRESENTATION.

*Hastings Mutual Fire Ins. Co. v. Shannon*, 2. S. C. R. 394, followed.] See INSURANCE, 2.

*Jacob v. Lawrence*, L. R. 4 Ir. C. L. 582, followed.] See DEFAMATION.

*Jones v. Just*, L. R. 3 Q. B. 197, followed.] See SALE OF GOODS.

*Johnasson v. Bonhote*, 2 Ch. D. 298, distinguished.] See RECOVERY OF LAND.

*Klein v. Union Fire Ins. Co.*, 3 O. R. 234, followed.] See INSURANCE, 1, 4.

*License Commissioners of North Riding of the County of Norfolk v. Corporation of Norfolk*, 14 O. R. 741, concurred in.] See CANADA TEMPERANCE ACT, 1878, 4.

*License Commissioners of Prince Edward, v. County of Prince Edward*, 26 Gr. 452, concurred in.] See CANADA TEMPERANCE ACT, 1878, 4.

*Merchants Bank v. Lucas*, 13 O. R. 520, distinguished.] See BANKS AND BANKING.

*Merchants Bank of Halifax v. Gillespie*, 10 S. C. R. 312, distinguished.] See CONSTITUTIONAL LAW.



*McGuin v. Fretts*, 13 O. R. 699, followed.] See RECEIVER.

*McNeely v. McWilliams*, 13 A. R. 324, followed.] See PATENT OF INVENTION.

*Rae v. McDonald*, 14 O. R. 352, discussed.] See BANKRUPTCY AND INSOLVENCY, 1.

*Regina v. Griffin*, 14 Cox C. C. 308, followed.] See CRIMINAL LAW, 2.

*Regina v. Ramsay*, 11 O. R. 210, distinguished.] See CANADA TEMPERANCE ACT 1878, 1, 3.

*Richardson v. Canada West Farmers Ins. Co.*, 17 C. P. 341, commented on.] See EVIDENCE.

*Robertson, Re, Robertson v. Robertson*, 24 Gr. 442; 25 Gr. 276, 486, followed.] See HUSBAND AND WIFE, 6.

*Sands v. Standard Ins. Co.*, 27 Gr. 16, followed.] See INSURANCE, 1.

*Sparrow v. Oxford etc., R. W. Co.*, 2 D. M. & G. 94, commented on.] See RAILWAYS AND RAILWAY COMPANIES, 1.

*Stinson v. Pennock*, 14 Gr. 604, followed.] See INSURANCE, 3.

*Stone v. Hyde*, 9 Q. B. D. 76, followed.] See MASTER AND SERVANT, 2.

*Swinbanks Ex p*, 11 Ch. D. 525, followed.] See SALE OF LAND, 4.

*Thomas v. Quartermaine*, 18 Q. B. D. 685, distinguished.] See MASTER AND SERVANT, 1.

*Thurtell v. Beaumont*, 1 Bing. 339, commented on.] See EVIDENCE, 2.

*Van Egmond v. Corporation of Seaforth*, 6 O. R. 610, not followed.] See MUNICIPAL CORPORATIONS, 2.

*Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197, 10 A. R. 162, 11 S. C. R. 612, commented on.] See RAILWAYS AND RAILWAY COMPANIES, 4.

*Wilde v. Gibson*, 1 H. L. Cas. 605 distinguished.] See FRAUD AND MISREPRESENTATION.

## CAUSE OF ACTION.

See RECEIVER.

## CAVEAT EMPTOR.

See SALE OF GOODS.

## CERTIORARI.

See CRIMINAL LAW, 1.

## CHILD.

See PARENT AND CHILD.

## CLEARING LAND.

See CROWN LANDS.

## COMPANY.

*Corporations*—Managing director—Remuneration of officer of company—Breach of trust—Set-off—Winding up proceedings—Jurisdiction of Master—Assignment of claim

*after winding-up order—R. S. C. ch. 129, sec. 77, sub-sec. 2, secs 83, 86, 87, 93.*]—By-law 17 of the B. & I. Company provided that the managing director should be paid for his services such sums as the company “may from time to time determine at a general meeting.” The only provision made at a general meeting was on January 27th, 1883, as follows: “The salary of the managing director was fixed until October 31st next, as at the rate of \$4,000 per annum.” L, the managing director, sought to recover services rendered as such subsequent to October 31st, 1883. *Held*, that he could not do so.

The position of L. as managing director rendering services for which remuneration was given, was not that of a servant hired by the company, but of a working member of the company, whose rights as to payment were to be measured by the provisions of the charter and by-laws of the company.

L. having withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services after October 31st, 1883.

*Held* that this was a breach of trust on L.’s part; and the amount thus withdrawn formed a debt based on a breach of trust, recoverable by the liquidator, under the special provisions of R. S. C. ch. 129, and as to which no set-off was permissible against any debt or dividend due from the company to L.

*Held*, also, that the Master had jurisdiction under sec. 83 of the said Act to investigate this transaction in these proceedings, which were for the winding-up of the company; and no formal objection should be allowed to affect the proper operation of that section.

*Held*, further, that the fact that L. had assigned his said claim against the company to his wife, after the winding-up order had been acted on, made no difference, since any such assignment would be subject to all the equities against such claim, and against the assignor as a director and trustee of the company’s funds in the proceedings under the winding-up order. *Re Bolt and Iron Co., Livingstone’s Case*, 211.

See RAILWAYS AND RAILWAY COMPANIES, 3.

## COMPENSATION.

See MASTER AND SERVANT—MUNICIPAL CORPORATIONS, 2—RAILWAYS AND RAILWAY COMPANIES, 1.

## COMPUTATION OF TIME.

*Week.*]—See CANADA TEMPERANCE Act, 1878, 2.

## CONCEALMENT.

See INSURANCE, 4.

## CONSIDERATION.

*Partial failure of.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

## CONSTITUTIONAL LAW.

*Dominion Winding-up Act—Constitutionality—B. N. A. Act sec. 91, art. 21—Provincial company—Application of Act.*]—*Held*, that the Winding-up Act, 45 Vic. ch. 23 (D.), is *intra vires* the Dominion Parliament, and is in the nature of an

insolvency law, and applies to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company in question in this case, though incorporated under a Provincial charter, was subject to its provisions.

*Re Eldorado Union Store Co.* 6, Russ. v. Geld. 514, followed; *Merchants' Bank of Halifax v. Gillespie*, 10 S. C. R. 312, distinguished. *Re Clarke and Union Fire Ins. Co.* (2), 618.

*See* COMPANY.

*See* CANADA TEMPERANCE ACT, 1878, 4.—CRIMINAL LAW, 2.

### CONTRACT.

*See* FRAUDS, STATUTE OF.—SALE OF GOODS.—SALE OF LAND. 4.

### CONVEYANCE.

*See* DEED—FRAUD AND MISREPRESENTATION.—HUSBAND AND WIFE, 5.—SALE OF LAND.—VOLUNTARY CONVEYANCE.

### CONVICTION.

*See* CRIMINAL LAW, 1.—MEDICAL PRACTITIONERS.

### CORPORATIONS.

*See* COMPANY.—RAILWAYS AND RAILWAY COMPANIES, 3.

### CORROBORATION.

*See* EVIDENCE, 2.

### COSTS.

*See* MEDICAL PRACTITIONER—WILL, 2.

### COUNTY COURTS.

*See* REPLEVIN.

### COURTS.

*See* TAVERNS AND SHOPS.

### COVENANT.

*Running with land.*—*See* HUSBAND AND WIFE, 4.

*See* MORTGAGE, 1.

### CROWN LANDS.

*Free grant — Locatee — License under the Crown*—*R. S. O. ch. 24, secs. 10, 11, 12—43 Vic. ch. 4, secs. 1, 2, 3, (O).*—*Clearing — Building.*—Where a locatee of lands, in clearing a portion thereof, reserved twenty-six pine trees thereon, thinking that they would be useful for building, but had previously erected a permanent house and stable, and put up fences and had enough timber left for building a barn without reserving the trees.

*Held*, that by thus reserving these trees, the locatee left them the property of the Crown, and a licensee of timber under the Crown had a right to cut and remove them.

Where a locatee of lands cut certain trees standing temporarily on a certain portion of the land, which he was in process of clearing, intending first to burn the fallow and then to cut them down.

*Held*, that a licensee of timber under the Crown, had no right to interrupt the locatee in clearing the lands and to cut and remove such trees.

The meaning of 43 Vic. ch. 4, (O) is, that all standing pine belongs to the Crown; when cut during the process of actually clearing the land for cultivation, or in order to build and fence on the location, it belongs to the locatee; otherwise when cut it still continues the property of the Crown. *Parker v. Maxwell et al.* 239.

---

### DAMAGE.

See BILL OF LADING.

---

### DAMAGES.

*Double value.*]—See DISTRESS, 2.  
MUNICIPAL CORPORATIONS—RAILWAYS AND RAILWAY COMPANIES, 1.—REPLEVIN, 2.—SALE OF GOODS.

---

### DEED.

*Machinery in mill*—Conveyance under R. S. O. ch. 104 and ch. 102, sec. 4—"General words."—Effect of on property adjacent to and used with property conveyed—Practice.]—In 1875 A. K. and H. K. entered into partnership as shingle makers for a term of years on equal terms and for the purposes of the partnership purchased in A. K.'s name a piece of land about 200 feet distant from the Georgian Bay, which was conveyed to him on 1st September, 1876. In the waters of the bay a shingle mill was erected which was connected with the land so purchased by a tramway which was filled from time to time with sawdust &c.

The mill was so erected for the convenience of floating logs to it. H. K. advanced the money to pay for the mill and machinery. The partnership was never formally dissolved although H. K. ceased to interest himself in its subsequent to June, 1876.

In June, 1876, A. K. mortgaged the said land to J. K. by a mortgage in the statutory form to secure a sum of money advanced by the mortgagee to him, and H. K. to secure the said loan also executed a mortgage of his individual interest as partner in the said land. This last mortgage recited the partnership and was given at the request of the mortgagee who was aware of the existence of the partnership. The mill was in operation until the end of 1882, having been run by different persons in the interval. The land in the mortgages contained was sold under the power of sale therein, and, with the intention of getting the machinery, was purchased by defendant, who, under authorization, removed the machinery. The land was conveyed by the same description to defendant by J. K. by deed, made pursuant to the Short Form of Conveyances Act, R. S. O. ch. 102. H. K. subsequently executed a release of the land to the defendant.

Under an execution against A. K. the machinery was seized by the sheriff after having been loaded on the cars for defendant.

In an interpleader issue it was *held*, [O'CONNOR, J., dissenting] that the mill and machinery comprising the articles in question became part of the realty in such a manner as to pass under the mortgage of the land from A. K. and H. K. to J. K. by virtue of sec. 4 R. S. O. ch. 104; and by the deed from J. K. to the defendant under sec. 4 of R. S. O. ch. 102.



Remarks by Armour, J., on the inconvenience of the practice of making the execution creditor the plaintiff in interpleader where the goods when seized are in the possession of the claimant *Winfield v. Fowlie*, 102.

See FRAUD AND MISREPRESENTATION.—HUSBAND AND WIFE, 5.—MUNICIPAL CORPORATIONS. 5.—SALE OF LAND, 4.—VOLUNTARY CONVEYANCE.

### CRIMINAL LAW.

1. *Weights and Measures Act—42 Vic. ch. 16, (D.), and amendment—Crime—Evidence of defendant—Imprisonment—Jurisdiction—Certiorari—Conviction bad in part.*—The defendant was convicted by two justices of the peace under the *Weights and Measures Act*, 42 Vic. ch. 16, sec. 14, sub-sec. 2, (D.), as amended by 47 Vic. ch. 36, sec. 7, (D.), of obstructing an inspector in the discharge of his duty, and was fined \$100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress.

At the hearing before the justices the defendant tendered his own evidence, which was excluded.

The defendant appealed to the Quarter Sessions, and on the appeal again tendered his own evidence, which was again excluded, and the conviction affirmed.

On motion for *certiorari*,

*Held*, That the conviction having been affirmed in appeal *certiorari* was taken away except for want or excess of jurisdiction, and that there was no such want or excess of jurisdiction, inasmuch as the Justices and the Quarter Sessions had jurisdiction

to determine whether the defendant's evidence was admissible or not, and that such determination, even if erroneous in law, could not be reviewed by *certiorari*.

*Per* ARMOUR, J. That even if the determination on this point could be reviewed the Justices were right in excluding the evidence of the defendant, inasmuch as the offence charged was a crime.

*Held*, also, [ARMOUR, J., dissenting,] that although irregularly directed imprisonment was justified in default of distress by sec. 62 of 32 & 33 Vic. ch. 31, (D.), incorporated in the *Weights and Measures Act* by sec. 53 thereof; but that if such imprisonment were not so justified the whole conviction would be bad, there being no power to amend by striking out the award of imprisonment.

*Per* ARMOUR, J. That the 32 & 33 Vic. ch. 31, sec. 62, (D.), should only be construed as fixing the duration of the term of imprisonment, where the special Act provides specifically for some imprisonment without fixing its duration; and that as no imprisonment is expressly imposed by the *Weights and Measures Act* for the offence charged here, so much of the conviction as awarded imprisonment was made without jurisdiction, and was therefore bad; but that it was separable from the rest of the conviction, and should be quashed, leaving, however, the rest of the conviction to stand. *Regina v. Dunning*, 52.

2. *Bigamy—British subject resident in Canada contracting second marriage abroad—R. S. C. ch. 161, sec. 4—Ultra vires—Constitutionality—Repugnancy to Imperial legislation—Dominion Parliament—Proof of foreign law—Proof of second mar-*

*riage.*].—*Held*, that R. S. C. ch. 161, sec. 4, which enacts that every one who being married marries any other person during the life of the former husband or wife whether the second marriage takes place in Canada or elsewhere, is guilty of felony, provided that the person who contracts such second marriage is a subject of Her Majesty, resident in Canada, and leaving the same with intent to commit the offence, is not *ultra vires* the Dominion Legislature either as being repugnant to Imperial legislation or on any other grounds.

*Per* BOYD, C.—This statutory law is nearly half a century old; it has been confirmed by the Court, past upon more than once by competent Colonial Legislatures and ratified by the express sanction of the Imperial Parliament and Her Majesty in person.

In order to prove the second marriage which took place in Michigan, the evidence of the officiating minister was tendered, who showed that during the last twenty-five years he had solemnized hundreds of marriages: that he was a clergyman of the Methodist Church: that he understood the laws of Michigan relating to marriage: that he had been all the while resident in Michigan, that he had communications with the Secretary of State regarding these laws; and that this so called second marriage was solemnized by him according to the marriage laws of that State.

*Held*, that this evidence was admissible in proof of the validity of the second marriage, and was sufficient proof of the same, even assuming that such ought not to have been presumed.

*Per* BOYD, C.—In the case of a second marriage it is not essential to

prove the foreign law where British subjects are concerned, as in this case.

*Regina v. Griffin*, 14 Cox C. C. 308, followed. *Regina v. Brierly*, 525.

## DEFAMATION.

1. *Slander—Qualified privilege—Bad faith—Malice.*].—Where one used defamatory language of another under circumstances of *quasi* privilege, but used the words in bad faith, not believing them to be true:

*Held*, that the expression must be considered as in excess of the requirements of the occasion and malicious, and he was not protected in an action for damages.

*Jacob v. Lawrence*, 4 L. R. (1r.) C. L. 582, cited and relied on. *Wells v. Lindop* (2), 275.

2. *Libel—Cause of action—Sufficiency of—Municipal corporations, liability for*].—The statement of claim alleged that from 1874 to 1883 the plaintiff was registrar of deeds of the County of Bruce: that in 1880 on a petition of the defendants to the Lieutenant-Governor, a commissioner was appointed to enquire into the conduct of the plaintiff as registrar, and an enquiry held, when charges of a defamatory character were made against the plaintiff, setting them out: that the charges were not sustained in law or by the evidence, and were shewn to be, and were, untrue in fact, and to have been made maliciously and with the design of injuring the plaintiff: that before the commissioner had made any report on the charges the defendants maliciously, and without any reasonable or probable cause, and with design and intention of injuring the plaintiff in his reputation, char-

acter and business, caused the accusations, charges and defamatory statements thereinbefore specially mentioned, and portions of the evidence adduced before the said commissioners, together with certain statements made by one R., who, during the investigation, acted as defendants' solicitor, to be printed and published in pamphlets and in the minutes of the County Council, and circulated throughout the county and elsewhere in the Province, greatly to the prejudice and detriment, damage, and injury of the plaintiff.

*Held*, on demurrer, that a good cause of action for libel was shewn, and that such action lies against a municipal corporation. *McLay v. Corporation of Bruce*, 398.

---

### DEFENCE.

*Deprived of making full.*]—See CANADA TEMPERANCE ACT, 1878, 1.

---

### DELAY.

See REPLEVIN.

---

### DEMURRER.

*Trial of action.*]—See RECOVERY OF LAND.

See RECEIVER.

---

### DEPOSIT RECEIPT.

See BANKS AND BANKING.

### DEPOSITIONS.

See EXTRADITION.

---

### DEVISE.

See WILL.

---

### DIRECTORS.

*Managing.*]—See COMPANY.

---

### DISCHARGE.

See INSURANCE.

---

### DISTRESS.

1. *Illegal distress for rent—Action for overholding tenant—Removal of goods.*]—The plaintiff having remained in possession and paid rent after the expiry of his term the defendants' levied a distress upon plaintiffs' goods in the premises, situate six miles from Toronto, for two months arrears of rent and removed the goods to Toronto to impound and sell. The plaintiff brought an action of trespass, claiming that he was not defendants' tenant.

*Held.*—1. That the relationship of landlord and tenant existed at the time of the distress. 2. That the removal to Toronto, unless unnecessary and unreasonable, or malicious, was not a good ground of action. *MacGregor et ux. v. Defoe et al*, 87.

2 *Illegal distress—No rent reserved*—2 *W. & M. sess. I, ch. 5, sec. 5—Damages—Double value.*]—In an action for illegal distress, in which

the Judge who tried the case found that the plaintiff occupied the premises in question under an agreement with the defendant, by the terms of which no rent was payable by the plaintiff to the defendant, and that the distress was therefore illegal, upon which the plaintiffs claimed double the value of the goods as damages, under 2 W. & M. sess. 1, ch. 5, sec. 5:

*Held*, that the fifth section of the statute, by reference to the second section, does not extend to a holding of land where there is no rent reserved; and that the plaintiff was not entitled to double value. *McCaskill v. Rodd*, 282.

---

See REPLEVIN.

---

## DIVISIONAL COURT.

See EXTRADITION.—TAVERNS AND SHOPS.

---

## DOCUMENT.

*Loss of—Proof of contents.*]—See EVIDENCE, 1.

---

## DOWER.

See HUSBAND AND WIFE, 6.

---

## DRAINS.

See MUNICIPAL CORPORATIONS, 1 3.

---

## EASEMENT.

See RAILWAYS AND RAILWAY COMPANIES, 3.

## EJECTMENT.

See RECOVERY OF LAND.

---

## EQUITY OF REDEMPTION.

*Dower out of.*]—See HUSBAND AND WIFE, 6.

---

## ESTATE.

*Privity of.*]—See HUSBAND AND WIFE, 4.

---

## ESTATE TAIL.

See WILL, 5.

---

## ESTOPPEL.

*By conduct.*]—See BANKS AND BANKING. — RECOVERY OF LAND.

---

See INSURANCE, 2.

---

## EVIDENCE.

1. *Document—Loss of—Proof of contents.*]—Where a party endeavours to prove by oral testimony the contents of a written document, the Court before giving effect to such testimony, should be convinced that all the terms have been proven. It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but he must set out the whole document so that the Court may be able to give effect to all its provisions, and that by testimony of the clearest nature. The document need not be set forth in evidence in its very words, but its exact sense and effect must be shewn. *Ross v. Williamson*, 184.



2. *Action to recover stolen money—Evidence of accomplices—Corroboration—Proof “without reasonable doubt”—Misdirection—New trial.*]

The plaintiffs claimed that a sum of money had been stolen from them by defendant, and brought an action to recover the money or land in which it had been invested. The evidence in proof of the charge was that of accomplices, and in corroboration the evidence of detectives who stated that defendant admitted the charge. The learned Judge charged the jury that if it was a criminal trial he should be compelled to tell them that, though they might convict on the evidence of accomplices, it was never safe to do so, and there should be some corroborative evidence to turn the scale against the presumption of innocence. He further said that this was not a criminal case, but yet he could not say the rule ought not to be applied, perhaps not precisely in the same way, but they were to exercise their common sense as to how far they would credit or discredit the evidence of accomplices. He also stated that when he said that corroborative evidence was necessary when accusations were sworn to by accomplices, he desired them to understand that the more particular point of corroboration should be the identity of the person accused, and unless the corroborative evidence identified the defendant with the stealing on the occasion and under the circumstances detailed in the evidence it would not be corroborative. His identity should be contained in the evidence of corroboration.

*Held*, [GALT, J., dissenting], that that the effect of the charge and the impression it was calculated to leave on the minds of the jury, fairly considered, was that the evidence of

accomplices in crime, which crime gave rise to the civil action, ought not to be credited or relied on, unless corroborated, and was misdirection; and there was also misdirection in charging that the corroboration must be as to the identity of the party charged with the criminal act.

It was urged that the misdirection, if any, was immaterial, because the defendant could not have been present taking part in the stealing of the money, because an alibi was proved: but *Held*, that the effect of the evidence as to the alibi had upon the jury depended much upon the credit to be attached to the accomplices' evidence, and as it could not be ascertained on what ground the jury found for the defendant, it was impossible to say that the jury may not have discredited the accomplices' evidence because of the alleged want of corroboration.

The learned Judge also in his charge, after stating that the plaintiff in an action had to make out his case, added, that is, he has to satisfy them that the evidence is sufficient to cause them to believe “without any reasonable doubt” that the claim the plaintiff makes is correct, and, if he fails to do so, there should be a verdict against him.

*Per* CAMERON, C. J. While of opinion that this was putting the plaintiffs' obligation more burdensomely than the law required, he could not say the learned Judge was without the warrant of authority for so charging.

*Thurtell v. Beaumont*, 1 Bing. 339, and *Richardson v. Canada West Farmers' Ins. Co.*, 17 C. P. 341, commented on.

*Per* ROSE, J. The charge on this point was quite correct. *United States Express Co. v. Donohoe*, 333.

*See* BANKRUPTCY AND INSOLVENCY, 2, 3.—CRIMINAL LAW—EXTRADITION.—MASTER AND SERVANT, 1.—PATENT OF INVENTION.

---

### EXECUTORS AND ADMINISTRATORS.

*See* PARENT AND CHILD.—SURROGATE COURTS.—WILL, 7.

---

### EXPROPRIATION OF LANDS.

*See* RAILWAYS AND RAILWAY COMPANIES, 1.

---

### EXTRADITION.

*Depositions—Authentication—40 Vic. ch 25, sec. 9, (D.)—Evidence, sufficiency of—Weight of—Divisional Court.*—In extradition proceedings the information, warrant and depositions were certified under the hand of a justice of the peace of Oscoda township, in the county of Josio, in the state of Michigan. There was also a certificate under the hand of the clerk of the county of Josio and the Clerk of the Circuit Court for the said county, and the official seal of the said Circuit Court, certifying that the said justice of the peace was, at the time of signing his certificate, a duly qualified justice of the peace, in the active discharge of the duties of his said office, and that his official seals were entitled to full credit. At the hearing before the county Judge, before whom the extradition proceedings were had, S. stated that he was the prosecuting attorney for Josio county, and all criminal prosecutions therein came under his care. He identified the papers, and that they were the depos-

itions and copies of depositions relating to the charge; and that the justices who took the depositions were justices of the peace as alleged, and had jurisdiction in the premises.

*Held*, that the documents were sufficiently authenticated.

“Authenticated,” as used in sec. 9 of 40 Vic. ch. 25, (D.), is in effect the same as “attested” in sec. 2 of 31 Vic. ch. 94, (D.)

*Held*, also, that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant issued.

*Held*, also, that the depositions, &c., before the County Court Judge disclosed sufficient evidence to warrant the defendant being placed on his trial for murder caused, as was alleged, by the defendant having feloniously ravished the deceased while in such a state of health as to hasten her death.

*Per* CAMERON, C. J. The Divisional Court cannot review the decision of the judicial officer having jurisdiction to hear extradition cases upon the weight of evidence. *Re Weir*, 389.

---

### FI. FA. LANDS.

*See* SALE OF LAND, 2.

---

### FIRE.

*See* INSURANCE.

---

### FIXTURES.

*See* INSURANCE, 3.

---

### FOREIGN LAW.

*See* CRIMINAL LAW, 2.

## FRAUD AND MISREPRESENTATION.

*Bona fides—Actual fraud—Conveyance executed—Possession—Cancellation.*—H. D. C. agreed in writing with C. C. on January 17th, 1882, to sell to him lots 37 and 39 for \$5,450, payable \$1,791 on the delivery of the deed, and upon the title to lot 37 being found satisfactory to C. C. or his solicitor, and upon a quit claim deed of lot 39 being delivered; the balance to be secured by mortgage; said sale to be completed within thirty days otherwise the deposit of \$25 to be forfeited. H. D. C., *bonâ fide* believing such to be the case, represented to C. C. at the time of the sale that a patent from the Crown had issued for lot 37, and, relying on this representation, C. C. entered into an agreement and afterwards verbally agreed to sell lot 37 at a large advance to one R. On February 10th, 1882, the conveyance was executed, the bulk of the purchase money \$4,025 having been paid prior thereto in cash, a promissory note being taken for the balance in lieu of the mortgage. It afterwards appeared that no patent had ever issued to lot 37, and notwithstanding the efforts of H. D. C., it was not till April 25th, 1883, that the department at length issued a patent, and then only for four chains of the lot, leaving ninety links outstanding. In February, 1883, C. C. had told H. D. C. that he would not keep the property, that by reason of no patent having issued, R. had withdrawn from his offer, and he demanded his money back with the actual expenses incurred. H. D. C. refused to cancel the sale, and C. C. now took these proceedings to have

the sale rescinded, and the deed delivered up to be cancelled.

*Held*, that there having been no actual fraud, and the deed of conveyance having been executed, the plaintiff could not have the relief sought for.

*Wilde v. Gibson*, 1 H. L. Cas. 605; *Brownlie v. Campbell*, 5 App. Cas. 925, and *Hart v. Swaine*, 7 Ch. D. 42, distinguished. *Cameron v. Cameron*, 561.

See BANKS AND BANKING—SALE OF LAND, 4.

## FRAUDS, STATUTE OF.

*Part performance—Staying of action—Specific performance.*—A. brought an action against B. for the rents and profits of certain lands, which had belonged to their father who had died intestate, which lands B. had taken and held possession of for several years. On the action being entered for trial an agreement of settlement was arrived at, by which the action was to be stayed upon B.'s granting and releasing to A. his interest in the lands, and on B. undertaking to obtain certain releases, &c. B.'s counsel appeared in Court when the case was called for trial, and stated it was settled, and an entry was made in the Court minute book, that the case was settled out of Court. Subsequently B. required A. to procure certain releases, and, although these had not formed part of the settlement, A. agreed to do so, and at great trouble and expense procured the execution of same ready to be delivered to B. Certain of the releases to be procured by B. were to be executed by married women and infants which he was unable to procure. In an action to

compel B. to carry out the settlement, B. set up as a defence the Statute of Frauds; and his inability to obtain the releases.

*Held*, [affirming the judgment of PROUDFOOT, J.,] that the staying of the action was a sufficient part performance to take the case out of the Statute of Frauds.

An option was given to A. to take a judgment for specific performance, with a reference as to compensation, if B. was unable to procure the releases; or a judgment for an account of the rents and profits, the subject of the former action. *Coates v. Coates*, 195.

See TRUSTS AND TRUSTEES.

## FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 1.

## FREE GRANT.

See CROWN LANDS.

## FREIGHT.

Rate of.]—See BILL OF LADING.

## GOODWILL.

See TRADE MARKS.

## HOTCHPOT.

See PARENT AND CHILD.

## HUSBAND AND WIFE.

1. *Marriage settlement—Children's portions—Vested interest—Vesting at birth payable at full age.*]—By

antenuptial settlement made in 1881, as reformed afterwards by decree of this Court, C. G. being possessed of \$25,000, and also of £1,000, conveyed these sums to trustees on trust after the marriage to pay the income to her separate use, and after her decease to pay the said income, or such part as she should appoint, to R. G., her intended husband, during his life, and after his death, on trust, "to and for any child or children of the said intended marriage, share and share alike if more than one, and if only one, then to such one in trust to apply the yearly income, revenue and increase arising from the said trust funds and estate towards the maintenance, support and education of such children during their respective minorities, each child to receive his or her share of the principal of said trust fund and estate on his or her attaining the age of 21 years, or in case of females on attaining such age or being married."

The marriage took place, and C. G. died in 1884, leaving R. G. her surviving, and two children, issue of the marriage, H. R. G. G., and A. G. G., the former of whom, however, died in 1886, under age.

*Held* that H. R. G. G. took a vested interest at birth in the moiety of the sums of \$25,000 and £1,000, and that R. G., his father, was entitled, as next of kin of H. R. G. G. to a moiety of said amounts, and that letters of administration should be taken out to his estate before the same could properly be paid to R. G. *Gill v. Gilmour et al.*, 129.

2. *Conveyance of lands by wife without her husband joining.*]—Where a woman, married in 1867 without marriage settlement, acquired lands



in 1879, by deed of conveyance to her in fee simple absolute.

*Held*, that she could convey the said lands to a purchaser without the concurrence of her husband. *Re Konkle*, 183.

3. *Separate business—Husband as agent of wife—Property of wife—R. S. O. ch. 125 secs. 5-7—49 Vic. ch. 19 (O.)*—K., who had failed in business and had become insolvent, about three years after the failure, made an arrangement with a wholesale firm to supply goods to his wife upon her own credit and responsibility. The wife had no capital of her own. The business was managed solely by the husband under power of attorney from the wife who took no part whatever in the same, and was at first carried on in premises owned by K., subject to a mortgage, on which she neither paid rent nor agreed to do so, but subsequently in premises leased by the wife. The goods were sold and further goods from time furnished by the firm on the like credit and responsibility. The plaintiffs had recovered a judgment against K. for a debt contracted by him before his failure upon which an execution was issued and the goods in question seized.

*Held*, [ROSE, J., doubting] that the goods were the property of the wife and not of the husband. *Dominion Loan and Investment Co. v. Kilroy*, 468.

4. *Covenant running with land—Assignment of the reversion by the lessor to his wife—Separate estate—Privity of estate—Set-off.*—In 1849 W. F. married A. F. without marriage settlement. In 1872 W. F. entered into a covenant for himself, his heirs and assigns, as lessor of certain lands, to pay, at the expira-

tion of the lease, for a certain malt house, which the lessee was to have liberty to erect, and did erect upon the demised premises. Pending the term W. F. conveyed the reversion in such a way that it became vested in himself and W. as trustee, as to the whole beneficial interest for A. F.

*Held*, [affirming the decision of FERGUSON, J., reported 12 O. R. 459,] that the separate estate of A. F. was not bound by the covenant, though she was equitable owner of the reversion as above mentioned at the time of the erection of the malt-house, and until the expiration of the lease.

*Per* BOYD, C.—Whether the covenant was one that ran with the land or not, and whether A. F. or her trustees were assignees within the meaning of 32 Hen. VIII. ch. 34, privity of estate is not tantamount to privity of contract so as without more to affect the separate estate of a married woman, as if she had expressly contracted with reference thereto.

*Held*, also [affirming the decision of FERGUSON, J.,] that a claim on behalf of the said trustees for rent in arrear, and for damages for non-repair, was not a matter of set-off against damages recovered against W. F. for breach of said covenant, though he was one of the trustees, they not being matters arising in the same right.

*Per* BOYD, C. — *Semble*, if the amount to be paid for the malt house had formed a lien on this particular land out of which the rent issued, it may be that the claim for set-off in respect of rent in arrear and damages for non-repair would have prevailed. *Ambrose v. Fraser et al.* 551.

5. *Voluntary conveyance—Declaration of trust.*—A husband, on 2nd September, 1885, by deed of B. & S. made in pursuance of the Act respecting short forms of conveyances, conveyed to his wife certain lands, the consideration being "natural love and affection and \$5," the receipt of the consideration being also admitted in the deed, besides the usual marginal receipt of the \$5; habendum to the wife, her heirs and assigns for her and their sole and only use forever.

*Held*, that the evident intention of the owner might be given effect to, as far at least as the beneficial interest in the property was concerned, and an order was, therefore, made, vesting in the wife all the estate and interest of the husband at the date of this deed to her. *Whitehead v. Whitehead*, 621.

6. *Dower—Building mortgage—Loan on progress certificates—Dower out of equity of redemption*—42 Vic. ch. 22, sec. 1 (O.)—*Costs.*—W. H. in 1883 made a mortgage of vacant land to a loan company, purporting to be a security for an advance of \$6,000, but with an agreement of even date, that the purpose of the loan being to enable W. H. to erect a house on the land, the mortgage money should be advanced only on architect's certificates of the progress of the building. M. A. H., wife of W. H., joined in this mortgage for the purpose of barring her dower only. The house was built and the mortgage moneys went into the building as agreed. In 1886 W. H. died, and in the course of the administration of his estate real and personal by the court this land was sold.

*Held*, reversing the decision of the master in ordinary, that M. A. H.

was entitled to dower in the full value of the land out of the balance of purchase money remaining after the payment off the mortgage, and this on the authority of *Re Robertson, Robertson v. Robertson*, 24 Gr. 442, 25 Gr. 276, 486, and by virtue of 42 Vic. ch. 22 sec. 1 (O).

Whatever may be the full meaning of 42 Vic. ch. 22 sec. 1 (O.), it cannot be held to have the effect of making the rights of a doweress less than they were held to be in *Re Robertson, Robertson v. Robertson, supra*.

*Held*, also, that the bank, the respondents to this appeal, being the parties having the carriage of the proceedings in the master's office and supporting the judgment of the master for the general benefit of the creditors, of whom they were one, should be reimbursed the costs of the appellant out of the estate, but not so as to prejudice the rights of the appellant. *Re Hague—Traders' Bank v. Murray*, 660.

*Sale of liquors by wife.*—See TAVERNS AND SHOPS.

---

## IMPRISONMENT.

See CRIMINAL LAW, 1.

---

## INCUMBRANCES.

See INSURANCE, 2.

---

## INDIANS.

See TAVERNS AND SHOPS.

---

## INFORMATION.

See CANADA TEMPERANCE ACT, 1878, 3.

**INJUNCTION.**

*To restrain sale.*—See **SALE OF LAND**, 3.

**INJURIOUSLY AFFECTED.**

See **MUNICIPAL CORPORATIONS**, 2.

**INSURANCE.**

1. *Fire—Mortgage clause—Payment of loss to mortgagees—Right of mortgagor to discharge—Statutory conditions—Mortgage—Proofs of loss.*—Under a covenant in a mortgage the mortgagee effected an insurance in the Queen Insurance Co. for \$6000, and transferred the policy to the mortgagor. The mortgagee, not having received the renewal receipt within three days before the expiration of the policy as required by the mortgage, effected an insurance of \$5000 with the Imperial Insurance Co., and by a subsequent arrangement the Queen policy was allowed to lapse. In 1880 a fire occurred and an amount was paid by the insurance company which was applied on the mortgage reducing it to \$1750, and the policy was reduced to that amount. The policy was then cancelled, and an application made by the investment company for a policy for said sum. The policy was to be, and was, issued in the name of the owner, stated in the application to be the plaintiff. The premiums were paid by the plaintiff. Attached to the policy was the mortgage clause whereby the insurance, as to the mortgagees' interest only, should not be invalidated by any act of the mortgagor; and if payment was made to the mortgagees and, as to the mortgagor no liability there-

for existed, the company as to such payment should be subrogated to the mortgagees' rights under all securities held collateral to the mortgage debt. In 1882 a fire occurred and the insurance company paid the investment company the \$1,750. The plaintiff claimed to have his mortgage discharged; but the insurance company disputed this, setting up that the plaintiff had no claim under the policy; and that having paid the investment company they were subrogated to their rights.

*Held*, that the plaintiff was entitled to the benefit of the money paid and to have his mortgage discharged, unless he had done something to forfeit his rights; but that there was no forfeiture, certain grounds of avoidance set up by the defendants not being tenable.

*Klein v. Union Fire Ins. Co.*, 3 O. R. 234, followed.

*Held*, also, following *Sands v. Standard Ins. Co.*, 27 Gr. 16, a mortgage was not an alienation, and therefore did not come within the third statutory condition.

Proofs of loss were furnished by the investment company which were accepted by the insurance company who paid them the amount of the loss without requiring proofs from the plaintiff.

*Held* that the insurance company could not set up the absence of proofs by the plaintiff. *Bull v. North British Canadian Investment Co., and Imperial Fire Ins. Co.*, 322.

2. *Incumbrance—Representation of agent as to—Estoppel—Just and reasonable conditions—Conditions as to payment of two-thirds value.*—In the application for a policy of insurance against fire, it was stated that there was no incumbrance. The

application was filled in by the company's agent. The insured informed him of the existence of a mortgage on the property when the agent told plaintiff that if there was nothing overdue thereon it was not an incumbrance, and, under this belief, there being nothing overdue, the statement was made. A policy was afterwards issued with conditions and variations. The 14th variation, was, that if any agent, &c., of the company shall have written or filled up any part of the application, he shall for that purpose be deemed the agent of the insurer and not of the company; and no statement, written or verbal, made to such agent, &c., as to any matter which the enquiries in the application extend should bind the company or affect the company with notice thereof unless stated in the application. The 15th variation was, that any fraudulent misrepresentation contained in the application, or any false statement therein respecting the title or ownership of the applicant or his circumstances, or the concealment of any incumbrance, or the failure to notify the company of any mortgage or incumbrance upon or other change in the title or ownership of the insured property rendered the policy void.

*Held*, [GALT, J., dissenting,] that the defendants were estopped from setting up the avoidance of the policy.

*Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450, and *Hastings Mutual Fire Ins. Co. v. Shannon*, 2 S. C. R. 394 followed.

*Per* GALT, J.—That irrespective of the agent's representation before the issue of the policy, the plaintiff after the issue thereof should, under the 15th variation, have notified the defendants of the mortgage.

*Per* ROSE, J.—The 14th variation was unjust and unreasonable on the facts of the case, and possibly generally; and the 15th variation did not apply; but even, if applicable, it was similar in terms to sec. 36 of 36 Vic. ch. 44, (O.) which was considered in *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27. C. P. 450.

*Per* CAMERON, C. J.—Whether the 14th variation was or not just and reasonable need not be considered, for it did not profess to provide that the company should not be bound by the agent's representation as to the meaning and effect of the questions in the application; and as to the 15th variation, it was competent for the parties to define what they understood was meant by incumbrance.

The 4th variation was, that in no case should the insured be entitled to recover more than two-thirds the actual value of any building or contents or other property insured; nor in case of further insurance by the insured or other party more than the rateable proportion of two-thirds of the actual value without reference to the date of the different policies; that any general policy on different properties shall be treated as a special policy on each property for the whole amount thereby insured. The insurance was \$100 on barn and stables valued at \$1,200, and \$900 on the contents valued at \$3,000.

*Per* CAMERON, C. J., and ROSE, J.—That as to the latter part of the condition referring to further insurance by the insured or other party, it was unjust and unreasonable; but as to the former part thereof, as to the payment of not more than two-thirds of the value of the property insured—which meant at the time of loss—it was just and reasonable. *Graham v. Ontario Mutual Ins. Co.*, 358.



3. *Fire*—14 Geo. III. ch. 78, sec. 83—*Applicability to this Province—Buildings—Machinery—Fixtures—Equitable right to insurance moneys—R. S. O. ch. 136, sec. 12.*—A mortgage was made by T. H. C. to D. of certain lands which contained a covenant to insure in a sum named. A second mortgage was made by the same parties to a bank to secure an indebtedness which also contained a covenant to insure without specifying any amount. At the date of the first mortgage there was an insurance for \$1,400, which was allowed to lapse. On the bank manager discovering this he procured T. H. C. to effect an insurance, advancing the money to pay the premium charging T. H. C.'s account therewith, and discounted a note made by T. H. C. and endorsed by B. H. C. to cover same. The policy was to T. H. C. alone, and was, on saw mill, \$400; on fixed and movable machinery, shafting, gearing, &c., \$1,000; on boiler and connections, \$100, and on engine and connections, \$500. Loss, if any, payable to the bank. On a fire occurring and the property being burnt D. required the insurance company to expend the moneys so far as they would go in rebuilding the insured premises.

*Held* [CAMERON, C. J., doubting], following *Stinson v. Pennock*, 14 Gr. 604, that the 14 Geo. III. ch. 78, sec. 83, is not merely of local application, but extends to this province, and applies to a case like the present.

*Held*, also [CAMERON, C. J., dissenting], that as between mortgagor and first and second mortgagees the fixed and movable machinery, &c., boiler, and boiler connections, &c., were included under the word "building" in the said section so as to entitle D. to the benefit of the

insurance thereon, for as between the parties they were treated as part of the freehold and passed as such.

*Per* CAMERON, C. J.—The operation of the statute should not be extended beyond its express words, and they limit its operation to an insurance upon a house or building as such, and do not extend to a distinct insurance of fixtures or machinery as such.

*Per* CAMERON, C. J., also. Apart from the claim of the bank or their assignees, D, as mortgagee on a mortgage with a covenant to insure would in equity be entitled to the insurance money if the insurance had been effected by both mortgagors, and the provisions contained in sec. 12 of R. S. O. ch. 136, are merely a legislative affirmance of such right. *Carr v. Fire Assurance Association*, 487.

4. *Fire—Construction of conditions—Addition to—"Unjust and unreasonable"—Concealment in application—Fraud and proof of loss.*—The plaintiff sued the defendants to recover the amount of a loss in respect of a dwelling house. The policy sued on, besides being subject to the statutory conditions, had indorsed on it, in the manner prescribed by the statute, several additions to such conditions, one of which was as follows: "Statutory condition No. 1 is added to" as follows:

(1) "Provided that any fraudulent misrepresentation contained in the application for insurance, or (2) any false or incorrect statement respecting the title or ownership of the property or the circumstances of the applicant, or (3) the concealment of any mortgage, or execution, or any incumbrance on the insured property or on the land on which it may be situate, or (4) the failure to notify

the company of any change in the title or ownership of the insured property, or of the creation of any incumbrance thereon or upon the land upon which the same is situate, and to obtain the written consent of the company thereto, shall render this policy void; and no claim for loss shall be recoverable hereunder unless the board of directors, in their discretion, shall see fit to waive the defect."

The land on which the house stood was charged with the maintenance of the plaintiff's father during his life. This charge was not disclosed by the plaintiff in his application for insurance, and such non-disclosure was not in any way explained.

*Held*, 1. That such non-disclosure was a concealment of an incumbrance within the meaning of the third branch of the addition.

2. That the concealment need not necessarily be designed or intentional in order to void the policy.

3. That the first statutory condition applied only to the physical risk, and did not apply to matters of title.

*Klein v. Union Fire Ins. Co.*, 3 O. R. 234, followed.

4. That the second and third branches of the addition were unjust and unreasonable in not providing that the matter falsely or incorrectly stated or concealed should be material to be made known to the company.

5. That although the Judge at the trial had not held or been asked to hold this condition not just or reasonable the Court before which a question relating thereto was pending could do so.

The plaintiff did not, in his declaration of loss, disclose the incumbrance in favour of his father. The jury did not find, nor were they asked to find, that there was any fraud or false

statement in the plaintiff's statutory declaration.

*Held*, that fraud or a wilful false statement should have been proved, and that it was not the place of the Court to infer it. *Reddick v. Sargeen Mutual Fire Ins. Co.*, 506.

---

## INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

---

## INSPECTION.

See SALE OF GOODS.

---

## INTEREST.

See WILL, 6.

---

## INVENTION.

See PATENT OF INVENTION.

---

## JUDGE.

*Power of to quash conviction—Appeal to Divisional Court.*—See TAVERNS AND SHOPS.

---

## JUDGMENT.

See MUNICIPAL CORPORATIONS, 1.

---

## JURISDICTION.

*Of Master.*—See COMPANY.

*Divisional Court.*—See EXTRA-DITION.

*Jurisdiction of Indian Agent.]—*  
*See* TAVERNS AND SHOPS.

*See* SURROGATE COURT.

---

## JURY.

*See* SURROGATE COURT.

---

## LACHES.

*See* BANKS AND BANKING.

---

## LAND.

*Covenant running with.]— See*  
 HUSBAND AND WIFE.

*See* CROWN LANDS—SALE OF LAND.

---

## LANDLORD AND TENANT.

*Severance of reversion—Apportionment—Tenancy from year to year—Notice to quit.]—*In July, 1880, M. conveyed certain lands to plaintiff which were embraced in lands of which the defendant was tenant from year of M. under a tenancy since 1868. In December, 1880, the plaintiff executed in favor of M. what purported to be a statutory lease of the lands conveyed to him at a yearly rent of twenty cents. The *habendum* was during the term of the occupancy as tenant of the lessee of said George Thompson, the defendant, "of the lands leased to him, the said term to be computed from the 2nd July, 1880, and from thenceforth next ensuing and fully to be complete and ended as soon as the said G. T. shall vacate the said premises or cease to reside thereon."

The defendant continued to pay rent to M., and never was called upon to attorn or to pay rent to the plaintiff, and received no notice to quit from M. prior to action brought, and no demand of possession from plaintiff until about the commencement of this action. M. required an undertaking from the plaintiff not to disturb defendant while he continued her tenant, and informed defendant of this lease, and that he should have undisturbed possession while he paid rent to her. The defendant claimed title under M., and contended that the conveyance did not effect his rights under his lease.

*Held*, that the lease by plaintiff to M. did not operate as a lease for years owing to the uncertainty of the termination thereof; but would be a tenancy at will until payment of rent when it would be a tenancy from year to year; and also might be deemed an agreement fixing the annual value of the premises at twenty cents, which M. should collect from the defendant and pay over to the plaintiff.

*Held*, also, that on the conveyance by M. to plaintiff there was a severance of the reversion, and the rent became apportionable at common law, but the concurrence of the defendants was necessary, or apportionment by a jury; and that it might not be unfairly assumed that there was such concurrence, and that defendant paid the twenty cents to M. for plaintiff, becoming thereby tenant from year to year to plaintiff; and entitled to six months notice to quit; or that M. paid the rent to plaintiff and became tenant from year to year to plaintiff; and she receiving rent as theretofore from defendant he was as against or under her entitled to the benefit of such

term, and either she or defendant to the six months notice.

The defendant was therefore entitled to possession until he received the proper notice to quit. *Reeve v. Thompson et al.* 449.

See HUSBAND AND WIFE, 4.—DISTRESS.

### LEGACY.

*Time for vesting.*]—See WILL, 8.

### LIBEL.

See DEFAMATION, 2.

### LICENSE.

*Timber.*]—See CROWN LANDS.—

See TAVERNS AND SHOPS.

### LIMITATIONS, STATUTE OF.

*Appropriation of payments.*]—Appropriation of payments are to be made (1) as the debtor directs at the time of payment. (2) When there is no direction by the debtor, as the creditor directs. (3) When neither makes any direction, then the law will apply it to the older debt, or as may be just.

The defendant was indebted to the plaintiff and gave him several promissory notes in payment, which fell due in 1871. The interest was paid up to August, 1878. The defendant thereafter paid in 1882, \$50, \$40, and \$100, and in 1883 \$100. The first two payments were specially appropriated by the defendant to the

interest, and the others were unappropriated.

*Held*, that the payments must be applied to the interest due on all the notes, the effect of which was to take them out of the Statute of Limitations. *Wilson v. Rykert*, 188.

See BANKS AND BANKING—VOLUNTARY CONVEYANCE.

### LIQUORS.

See TAVERNS AND SHOPS.

### LOCAL LEGISLATURES.

See CANADA TEMPERANCE ACT, 1878, 4.

### LOCATEE.

See CROWN LANDS.

### MACHINERY.

See DEED—INSURANCE, 3—MASTER AND SERVANT.

### MAGISTRATE.

*Jurisdiction of.*]—See CRIMINAL LAW—MEDICAL PRACTITIONERS.

*Order preventing action against.*]—See TAVERNS AND SHOPS.

*Interest of.*]—See CANADA TEMPERANCE ACT, 1878, 1.

### MAINTENANCE.

See WILL, 1.



**MALICE.**

*See* DEFAMATION, 1.

---

**MANDAMUS.**

*See* SURROGATE COURTS.

---

**MARRIAGE.**

*Bigamy.*—*See* CRIMINAL LAW, 2.

---

**MARRIAGE SETTLEMENT.**

*See* HUSBAND AND WIFE, 1.

---

**MASTER IN ORDINARY.**

*Jurisdiction of.*—*See* COMPANY.

---

**MASTER AND SERVANT.**

1. *Negligence*—47 *Vict. c. 39, s. 15, sub-s. 1 (O.)*—49 *Vict. c. 28 (O.)*—*Evidence omitted at trial—Admission of—Terms.*—In defendants' dye-house a number of vats were used for boiling cotton. In the course of his employment, as a dyer in defendants' factory, in which he had been employed at the same work for about three years, it was necessary for plaintiff to stand on the top of one of these vats, the cover provided for which consisted of several boards, whose average diameter was 5 feet 6 inches by 10 inches, the vat being 5 feet. About 3rd December, 1886, plaintiff complained to defendants' foreman that these boards were insufficient in number to cover the vat completely, but defendants did not remedy the defect; and on 6th of

same month, while at work standing on them, one of the boards slipped sideways, precipitating plaintiff into the boiling liquid. Defendants thereafter remedied the defect. A similar accident had occurred in the factory two years before.

*Held*, setting aside a non-suit, in an action brought by plaintiff for damages, that there was sufficient evidence of negligence on defendants' part, in not having had the vat "securely guarded," in compliance with the Ontario Factory Act, 1884 (47 *Vic. ch. 39, sec. 15, sub-sec. 1*), to have justified a jury in finding for plaintiff.

*Per* WILSON, C. J. The plaintiff could not recover under the Workmen's Compensation for Injuries Act (49 *Vic. ch. 28*), because he was barred by the maxim *volenti non fit injuria*, under *Thomas v. Quartermaine*, 18 C. B. D. 685.

*Per* ARMOUR, J., that independently of the Factory Act there was evidence of negligence on defendants' part to entitle plaintiff to sue under sub-sec. 1 of sec. 3 of the Workmen's Compensation for Injuries Act, and that the maxim *volenti &c.* had no application to the facts of the case.

*Thomas v. Quartermaine, supra*, considered and distinguished.

The Court, on the argument, allowed the plaintiff, on terms, to give in evidence the proclamation bringing into force the Ontario Factory Act. *Dean v. Ontario Cotton Mills Co.*, 119.

2. *The Workmen's Compensation for Injuries Act, 1886—Negligence of person in charge of machine—Notice of action*—49 *Vict. ch. 28, secs. 3, 7, 10 (O.)*—Solicitors for the plaintiff before action wrote as follows to the defendants:—

"We have been consulted by Mr. J. Cox concerning injuries sustained by him while in your employ by which he lost his left hand. We have received instructions to commence an action against you for damages, unless the matter is satisfactorily settled without delay. If you intend contesting this suit, kindly let us have the address of your solicitors who will accept service of process on your behalf."

*Held* reversing the decision of CAMERON, C. J., C. P. D., that this was sufficient notice of action to satisfy the requirements of 49 Vict. ch. 28, sec. 7, and sec. 10, (O.)

*Stone v. Hyde*, 9 Q. B. D. 76, followed.

*Held*, also, that the evidence in this case, in which the plaintiff, while at work in the sweat-box of a sewer pipe company and engaged in placing the clay in the press, way according to his witnesses, injured by reason of S. who was in charge of the press, causing the plunger to come down before the plaintiff had given the word, and while his hand was in the press, *prima facie* brought it within sec. 3, sub-sec. 3 of the said Act, and the nonsuit must be set aside and a new trial had.

*Per* BOYD, C.—If, while in obedience to orders, injury arises through the negligence of one giving the orders, it is sufficient under this sub-sec., and it is not necessary that an order negligent *per se* should have been given, nor is any specific order necessary, general prior orders being sufficient. *Cox v. Hamilton Sewer Pipe Co.*, 300.

## MEDICAL PRACTITIONER.

*Ontario Medical Act, R. S. O. ch. 142—Unlawfully practising medi-*

*cine—Costs of conveying to gaol—Conviction quashed—Costs.*—*Held*, that a Justice of the Peace, on a conviction under secs. 40 and 46 of ch. 142 R. S. O., intituled an Act respecting the profession of medicine and surgery, had no jurisdiction, on default by the defendant of payment of fine and costs, to direct his confinement for the space of one month, unless, in addition to the payment of the fine and costs, he paid the charges of conveying him to jail. *Regina v. Wright*, 668.

## MISDIRECTION.

*See* EVIDENCE, 2.—PARTNERSHIP.—RAILWAYS AND RAILWAY COMPANIES, 4.

## MISREPRESENTATION.

*See* FRAUD AND MISREPRESENTATION.

## MISTAKE.

*See* SALE OF LAND.

## MORTGAGE.

1. *Action on covenant—Mortgagee becoming owner—Extinguishment.*—In an action on the covenant for payment in a mortgage for the amount of the deficiency after the exercise of a power of sale, defendant set up the sale under the power to one W. and a re-transfer by W. on the same day to plaintiff, by which plaintiff became the owner of the land.

*Held*, on demurrer, no defence. *Pegg v. Hobson*, 272.

2. *Power of sale to trustees—Change of trustees—Exercise of power by new trustees—R. S. O. ch. 107, sec. 3.*—The R. S. O. ch. 107, sec. 3, provides that every new trustee shall have the same powers, authorities, and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust. Where a mortgage made in favor of two trustees of a marriage settlement, and which contained a power of sale exercisable by them, and not by an assignee of the mortgage, not being in conformity with the Short Form of Mortgage Act, was together with the lands therein, on the resignation of the trustees, assigned to a new trustee appointed in their place.

*Held*, that the new trustee stood in the place of the former trustees, and could exercise the power of sale, not as an assignee of the estate, but as if appointed a trustee by the deed creating the trust. *Re Gilmour and White*, 694.

3. *Power of sale in—Variation of power of sale in short form of mortgage—"One month" substituted for "—months"—Vendor and purchaser Act R. S. O. ch. 109.*—G. was assignee of a mortgage made pursuant to the Act respecting short forms of mortgages, and which contained a power of sale in the words "provided that the said mortgagee on default of payment for one month may on giving notice in writing enter on and lease or sell the said lands."

In an application under the Vendor and Purchaser Act, R. S. O. ch. 109.

*Held*, that the substitution of "one month" for "—months" was not a material variation in the form; and

that G. could make a good title. *Re Green and Artkin*, 697.

*Progress certificate.*—See HUSBAND AND WIFE, 6.

See DEED—INSURANCE, 1.—SALE OF LAND, 4.—TRUSTS AND TRUSTEES.—WILL, 6.

## MUNICIPAL CORPORATIONS.

1. *Municipal Act—By-law—Drainage—Formalities required—Omitting to move to quash—Void by-law—Judgment—Parties—Joinder of certain land-owners in action for damages arising from drainage works—46 Vic. ch. 18 (O.), secs. 333, 335, 340, 584, 589.*—Sec. 589 of the Consolidated Municipal Act, 1883, 46 Vic. ch. 18 (O.), does not authorize the passing of a by-law for cleaning out or improving a drain without the due observance of the formalities mentioned or referred to in sec. 584. It must be read in conjunction with the respective sections mentioned in it.

Where, therefore, the defendants purported to pass and act upon a by-law for the cleaning out or improvement of the McG. drain, and the assessment of certain persons for the necessary costs, and this without any petition being presented therefor, or any assessment of an engineer, or any statement by an engineer of the proportion of benefit to be derived from the work by any lot or part of a lot of land, and without publishing the by-law or assessment, or the holding of any court of revision to which appeals from the proposed assessment might be made.

*Held*, that such by-law was unauthorized and illegal, and that being a void proceeding an attack upon it was not prevented by secs. 333, 335,

or 340 of 46 Vic. ch. 18 (O.), as to quashing by-laws; and also that though the plaintiffs in this action were not moving to quash the by-law or suing for damages under it, but only asking for a declaration that it was illegal, and an order restraining the defendants from collecting from them the assessment thereunder, and compelling them to remove the charge thereunder upon the plaintiffs' lands, they were entitled to have it declared that they were not liable to pay the assessments against them under the by-law in question, on the ground that the same was illegal and a void proceeding.

The plaintiffs brought this action as landowners injuriously affected by certain drainage works of the defendants and the assessments made under by-laws relating to the same, seeking damages and other relief.

*Held*, that there was no misjoinder of plaintiffs, nor was it incumbent on the plaintiffs to sue on behalf of any others, and also that the plaintiffs had the right to thus proceed by way of action and not of arbitration. *Alexander et al. v. Corporation of Howard*.—*Galbraith v. Corporation of Harwich*, 22.

2. *Jurisdiction over streets—Absence of by-law for the work—Damage to adjacent owners—Remedy by action or arbitration*—46 Vic. ch. 18, (O.)—The plaintiff, who was the owner of certain premises which were "injuriously affected" by the raising of the street by the defendants in rebuilding a bridge and its approaches, brought an action for damages.

*Held*, that he could not avail himself of the absence of a by-law for the construction of the bridge in order to proceed by way of an action for damages, and that his remedy was under the arbitration clauses of

the Consolidated Municipal Act, 1883, (46 Vic. ch. 18 (O.)), for compensation.

An owner of land has by common law no vested right to the continuance of a highway at the level it was when he purchased.

The corporation, as owners or trustees for the public, have the right to repair and, in repairing, to improve streets and bridges without a by-law for that purpose.

*Vun Egmond v. Corporation of Seaforth*, 6 O. R. 610, not followed. *Pratt v. Corporation of Stratford*, 260.

3. *Drainage works extending through adjoining townships*—46 Vic. ch. 18, ss. 570, 598 (O.)—The township of N., on the petition of seven out of ten property owners, passed a by-law under 46 Vic. ch. 18, sec. 570 (O.), for construction of a drain which was to extend through the adjoining township of D., forming one entire scheme of drainage through both townships. The property owners directly affected by the work were thirty-nine in D. and 10 in N., and the rateable division of the costs of the work was \$1,345 to be paid by N., and \$5,725 by D.

This action was brought by N. to compel D. to pass a by-law under 46 Vic. ch. 18, sec. 581, to raise its proportion of the fund, which it refused to do.

*Held*, [affirming the judgment of GALT, J.], that the case was not one contemplated by sec. 570 and following sections, but fell within sec. 598, and the county council was the proper authority to pass a by-law for the proper construction of such a drain as that proposed.

*Semble*, that, even under sec. 570, in cases where the drainage work extends beyond the limits of one



township, a petition by the majority in number of the persons to be benefited in any part of the townships is required, the parts of both townships being considered for the purpose of the Act as forming a quasi-municipality for the proper drainage of the combined parts of the two municipalities, so that a majority of all that section formed by the combined parts of the two municipalities may ask for, and if the council of the originating township thinks proper, obtain the needful relief.

*Corporation of Dover v. Corporation of Chatham*, 12 S. C. R. 321, commented on. *Corporation of West Nissouri v. Corporation of North Dorchester*, 294.

4. *Drainage by-laws—Assessing lands benefited—Alteration of assessments—Pro rata variation—Judgment declaring prior by-law invalid—Effect of.*—On 21st September, 1868, a by-law was passed by defendants for constructing three several drains in a township, setting forth in separate schedules the lands to be benefited according to the engineer's report, and the amount required therefor to be assessed and levied on the said lands. On 11th December, 1883, the defendants passed a by-law for repairing and cleaning one of said drains, the amount required therefor to be assessed and levied on the said lands assessed for the original construction of said drain. On 21st September, 1886, another by-law was passed to change the assessment for the construction of said drain, and to make it more equitable and prevent injustice in levying same. The engineer was, in making his assessment, limited by the reeve to the lands assessed for the original construction of said drain, and he accordingly limited his

assessment thereto, but he reported that great injustice would be done thereby, as a large area of land which would be benefited by the work would escape assessment. The last mentioned by-law declared that the report was adopted, and that in accordance therewith the original assessment should be changed and the assessments as made by the engineer adopted, disregarding his protest as to the large area of land benefited being unassessed. There was an appeal to the Court of Revision against the assessment, and the Court, discriminating in favour of some and against others, altered some of the assessments by deducting amounts therefrom and placing the amounts so deducted on others, leaving others undisturbed, thus not making a *pro rata* variation of all the assessments.

*Held*, that the by-law was bad, and must be quashed.

In 1886 an application was made to the Chancery Division to quash the by-law passed in 1883, which was heard in December, 1886, and judgment delivered in February, 1887, declaring the by-law to be a void proceeding. The by-law in question was passed on 21st September, 1886.

*Quere*, whether this rendered the by-law in question invalid. *Re Clark et al. and Corporation of Howard*, 598.

5. *Altering grade of street—Necessity for by-law—Negligence, evidence of—Action for damages.*—Action for damages sustained by the plaintiff by reason of the defendants lowering the grade of the street in front of her store. The property owners, but not including plaintiff, had petitioned the council for the block-paving of the street as a local

improvement under section 612 of the Municipal Act of 1883. The matter was duly considered, and a by-law passed to ascertain the property to be benefited thereby, and the expense and amount of assessment; and subsequently a further by-law was passed for raising the money required therefor by loan, and for assessing the amount. It was deemed advisable to change the grade, and the street was lowered in front of the plaintiff's premises about four feet. No reference was made in the said by-laws as to any alteration in the grade, nor was any by-law passed therefor.

*Held*, that there was no negligence in the corporation by reason of the lowering of the grade, for the work was undertaken in the interests of the residents, and executed under the advice and direction of a presumably competent engineer, the learned Judge considering that he could not assume the discretion vested in the corporation of deciding as to the necessity of lowering the grade; but *Held*, that in order to justify the interference with the grade of the street a by-law therefor was necessary; and in the absence of such by-law the defendants were liable, by action, for the damage sustained. *Ayers v. Corporation of Windsor*, 682.

CANADA TEMPERANCE ACT, 1878,  
4.—DEFAMATION, 2.

## MUTUAL INSURANCE.

*See* INSURANCE, 2.

## NAVIGATION.

*See* BILL OF LADING.

## NEGLIGENCE.

*See* MASTER AND SERVANT.—  
MUNICIPAL CORPORATIONS, 5—RAIL-  
WAYS AND RAILWAY COMPANIES, 4.

## NEW TRIAL.

*See* EVIDENCE, 2.

## NEXT OF KIN.

*See* PARENT AND CHILD.

## NOTICE.

*See* BANKS AND BANKING.

## NOTICE OF ACTION.

*See* MASTER AND SERVANT, 2.

## NOTICE TO QUIT.

*See* LANDLORD AND TENANT.

## ONUS.

*See* RECOVERY OF LAND.

## OVERHOLDING TENANT.

*See* DISTRESS, 1.

## PARENT AND CHILD.

*Advancement—Hotchpot—Promis-  
sory note—R. S. O. ch. 105, secs. 41-  
43—Administration—Parties—Next  
of kin.*—J. H. died intestate, and  
among his assets was a promissory  
note for \$500 made by his son in

respect to moneys received by the latter from him. This son predeceased J. H., and died intestate and insolvent, leaving a child, who, under the Statute of Distributions, was entitled to a one-fifth distributive share of the estate of J. H.

*Held*, that the grandchild of J. H. was not bound to bring the \$500 into hotchpot before sharing in the estate of J. H., and that R. S. O. ch. 105, secs. 41-43, did not apply to this case.

Difference between the law of England and our own as to advancements to children commented on. Under our law, an advancement is neither a loan nor debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate estate of the donor he shall bring in this property for the purposes of equal distribution.

*Semble*, that the administrator of J. H. did not properly and fully represent the next of kin entitled to share in the estate of J. H., and they would not be bound by any decision in their absence. *Re Hall*, 557.

---

## PARLIAMENT.

*See* CRIMINAL LAW, 2.

---

## PAROL EVIDENCE.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.—PATENT OF INVENTION—TRUSTS AND TRUSTEES.

---

## PART PERFORMANCE.

*See* FRAUDS, STATUTE OF.

## PARTIES.

*Joinder of.*]—*See* MUNICIPAL CORPORATIONS, 1.

*See* PARENT AND CHILD.

---

## PARTITION.

*See* WILL, 4.

---

## PARTNERSHIP.

1. *Style of*—*Name of individual member*—*Note made in firm name*—*Dissolution*—*Liability of firm*—*Misdirection.*]—J. E. Dunham carried on business at Montreal from February, 1886, to 1st September, 1886, under the style of J. E. Dunham & Co. The same J. E. Dunham with W. W. Park carried on business at Toronto from last May, 1886, to last August, 1886, under the same style of J. E. Dunham & Co.

By the articles of partnership between Dunham and Park it was agreed that Dunham should not sign the firm name to bills or notes. The dissolution of the partnership between Dunham and Park was not advertised until the 20th August, 1886. Dunham, for purposes of his own, and without the knowledge of Park, upon the 11th of August, 1886, signed a series of notes amounting to \$21,000 with the firm name of J. E. Dunham & Co., and gave them to one Isaacs. The note in question in this action was one of that series, but antedated upon the 30th July.

The plaintiffs who had no knowledge of Park being a member of J. E. Dunham & Co., took this note without notice of any infirmity, and to secure a pre-existing debt which was overdue. The Judge at the

trial charged the jury that the plaintiffs had a right to resort to either firm for payment.

*Held*, a misdirection, and that there was no such right of election; that it was for the creditor to prove who his debtor was and not for the defendants to prove that they were not the debtors.

*Held*, also, that if this note had been given before the 1st of August, the Judge at the trial should have left it to the jury to say which firm Dunham intended to bind; but as the note was not given during the partnership, and as the plaintiffs had no knowledge of the firm, or of Park being a member of it, the question was not material.

*Held*, also, that as the plaintiffs knew nothing of the firm of J. E. Dunham & Co., or the members of it, and had had no dealings with it, the defendant Park was not liable on the note signed after the 1st of August, when the dissolution actually took place, although before the 20th of August, when publication of the same was made.

As the facts were all before the Court, instead of ordering a new trial, judgment was given for the defendant Park, with costs. *Standard Bank v. Dunham et al*, 67.

2. *Dissolution—Agreement by new firm to pay debts of old—Right of creditors to enforce—Creation of trust.*—K. & M. having carried on business under the name of K. & Co., dissolved partnership, and K gave M. sixteen promissory notes for \$500 each, with interest, for his share in the business, which was continued by K. K. afterwards, by agreement under seal, formed a partnership with O., to continue until a joint stock company should be formed to take over their assets, and K., by this deed, was to trans-

fer to the co-partnership, as his contribution to the capital, all the assets of his business, to be taken at valuation, subject to the deduction of his liabilities, which were to be assumed by the co-partnership and charged against him. Among K.'s liabilities, known to O., were ten of these notes, which he had endorsed to the plaintiff before they fell due. The company was formed, and K. transferred his interest to it. The new firm paid two of the notes, with interest on the others, and there were negotiations for an extension of time to pay the whole. The assets of R. transferred to the new firm were sufficient to pay his liabilities.

*Held*, that though the plaintiff could not have sued upon the deed, not being a party to it, the circumstances established the relationship of trustee and *cestui que trust*, and entitled the plaintiff through K., as trustee, to enforce performance of the stipulation in the deed for payment of the notes held by her. *Henderson v. Killey et al*, 337.

See ELECTION—PATENT OF INVENTION.

## PATENT OF INVENTION.

*Assignee using invention—Right to dispute validity of—Combination—Manufacture upon or after principle of invention—Evidence—Parol evidence—Admissibility of—Res judicata—Partnership.*—Action to recover royalties alleged to be payable on threshing machines manufactured by defendant under an indenture made between plaintiff B. and defendant, whereby the plaintiff B. sold and transferred to the defendant the right to manufacture



and use a certain invention known as "Beam's Thresher"; and in consideration thereof the defendant agreed to pay a named royalty on all machines manufactured "upon or after" the principle of the invention. The plaintiff B. subsequently assigned to his co-plaintiff F. one half share or interest in the invention, and also one-half of the moneys then, and to grow, due under the indenture. The plaintiff's patent was for a combination, part only of which was used by defendant. The machines in question were manufactured after the assignment to F. The defendant objected that the patent was invalid, on the ground of want of novelty in the invention, and that it was not the subject of a patent; and also that the machine was not manufactured on the principle of the plaintiff's patent. Parol evidence was admitted, subject to objection, that the plaintiff agreed to prevent any infringement of the patent, and, if he failed to do so, he should not be entitled to any royalties. The agreement contained no such stipulation.

*Held*, (1) that the defendant having used the plaintiff's invention, could not raise the objection to the validity of the patent. (2) That whether the machines were or not manufactured "upon or after" the principle of the plaintiff's patent, was a question for the jury on the evidence, and they having found, as they were warranted by the evidence in doing that they were so manufactured the finding could not be interfered with. (3) That the parol evidence was not admissible to vary the deed, following *McNeely v. McWilliams*, 13 A. R. 324; and also that by a prior judgment of the Q. B. D., the matter was *res judicata*, and the fact that the judgment was

between B. alone and defendant, could make no difference.

In an action under a similar agreement, the defendant partially manufactured a number of machines, and then sold out his establishment to a firm M. D. & Co., who completed the machines, and labelled them as required by the contract. Afterwards the defendant took M.'s place in the firm, and the firm manufactured a number of machines upon and after the principle of the plaintiff's patent which they labelled with another name from that required by the contract. The plaintiffs sued for the royalties, and for not labelling as required.

*Held*, that the plaintiffs were entitled to recover as for a manufacture and sale by defendant, for they might assume that the defendant was making the machines under the contract, and that the firm were but agents working for him. *Beam et al. v. Merner*, 412.

#### See TRADE MARKS.

---

### PLEADING.

*Demurrer.*]—See MORTGAGE, 1.—RECEIVER.

*Admissions in.*]—See RECOVERY OF LAND.

---

### POSSESSION.

*Notice to quit.*]—See LANDLORD AND TENANT.

*Title by.*]—See TRUSTS AND TRUSTEES.

See FRAUD AND MISREPRESENTATION.

**POWER OF SALE.**

*See* MORTGAGE, 2, 3—SALE OF LAND, 3.

**PRACTICE.**

*See* DEED.

**PREFERENCE.**

*See* BANKRUPTCY AND INSOLVENCY, 2.

**PRESCRIPTION.**

*See* RAILWAYS AND RAILWAY COMPANIES, 3.

**PRINCIPAL AND AGENT.**

*See* HUSBAND AND WIFE, 3.

**PRINCIPAL AND SURETY.**

*Agreement to extend time.*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

**PRIVILEGE.**

*See* DEFAMATION, 1.

**PROOFS OF LOSS.**

*See* INSURANCE, 1, 4.

**PROMISSORY NOTES.**

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

**PROVINCIAL LEGISLATURES.**

*See* CONSTITUTIONAL LAW.

**RAILWAYS AND RAILWAY COMPANIES.**

1. *Expropriation by railway company of part of block of land acquired for specific purpose—Liability to take the whole—Right to exercise option after taking possession—Damages—R. S. O. ch. 109. sec. 100, cl. 2.*—The plaintiffs were incorporated under 37 Vic. ch. 91 (O.) for the purpose of building a cathedral, and were the owners of a block of land enclosed within one fence, and bounded on three sides by streets, known as the Cathedral or Chapter House Block, upon which they had erected a Chapter House as part of the Cathedral, and had leased other portions, but for want of funds the other part of the Cathedral was not proceeded with for some years.

The defendants, in constructing their railway, required part of the block, which would cut off a part of the Cathedral, when erected, for their line and took possession of it, but the plaintiffs, under the circumstances, declined, to sell, or convey, or arbitrate as to the value of anything less than the whole block.

In an action to compel the railway to take the whole and desist from their proceedings as to part only, it was

*Held*, that the block of land was set apart for Cathedral purposes, and had not, by any default of the plaintiffs, lost that distinctive ecclesiastical character, and an injunction was granted against the railway taking a part only, as in *Sparrow v. The Oxford, &c., R. W. Co.*, 2 D. M. & G. 94.

It was also contended by the plaintiffs that the defendants having taken possession could not withdraw, but must now take the whole block.

*Held*, that the mere going into possession of part, although a high-handed act on the part of the defendants, did not necessarily commit them to the purchase of the whole; and that the defendants should have the option to take the whole or withdraw, and pay all damages and costs sustained by the plaintiffs. *Cathedral of the Holy Trinity v. West Ontario Pacific R. W. Co.*, 246.

2. *Bona fide commencement of work on—Special Act—General Act—Inconsistency between—Construction of.*]—When a company is incorporated by a special Act, and there are provisions in the special Act as well as in a general Act on the same subject which are inconsistent; if the special Act gives in itself a complete rule on the subject, the expression of that rule amounts to an exception of the subject matter of the rule out of the general Act.

When the rule given by the special Act applies only to a portion of the subject, the special Act may apply to one portion and the general Act to the other.

The probable intention of the Legislature is important in considering a matter of such a character.

The plaintiffs were empowered by their Act of incorporation to construct a railway in sections between the River S.S.M., on the west, and G. on the east, and such railway was by the twenty-third, section of their Act to be commenced within three years, and to be completed within six years from 4th March, 1881. In the years 1881 and 1882 they surveyed, located, and filed plans from the River S. S. M. easterly to S. R.

about one third of the entire length of their road, and did some work thereon of the character of "construction" such as grading, blasting, and chopping. Little more was done by them from 1882 to 1886 owing to financial reasons, but with no intention of abandoning the road.

The defendants who had constructed a line of railway as far west as A. proceeded, in December, 1886, to continue the construction of their line westerly from A. to the River S. S. M., and in doing so used the line which plaintiffs had located.

*Held*, on the evidence, that the work done by the plaintiffs was a *bona fide* commencement of their railway within the three years required by their Act.

*Held*, also, that as the plaintiffs were authorized to construct their railway in sections, they were not bound before commencing work to file plans of their whole line.

By the General Railway Act, R. S. O. ch. 165, which was by the plaintiffs' special Act incorporated therein except as varied by the latter, ten per cent. of the capital of the railway was by sub-sec. 5 of sec. 36 required to be expended within three years, and the railway was to be completed within ten years of the passing of the special Act, in default of which the corporate existence of the company ceased, and by section 4 of the special Act, sections 4 to 36 thereof inclusive were to apply to all railways authorized to be constructed by any special Act of the Province, and to be constructed therewith as forming one Act.

*Held*, that section 4 of the general Act did not apply to the plaintiffs, and that section 23 of their special Act must be read in substitution for sub-sec. 5 of sec. 36 requiring the

expenditure of ten per cent. of the capital within the three years. *Ontario and Sault Ste Marie R. W. Co., v. Canadian Pacific R. W. Co.*, 432.

3. *Subway—Easement—Prescription—Corporation—Consolidated Railway Act 1879—42 Vic. ch. 9, sec. 27.*—Where in building their road the defendants left a subway under a trestle bridge, and the evidence shewed that the plaintiff, the owner of the land crossed by the railway at this point, had enjoyed the open and continuous user of this subway as of right ever since 1862, but that the defendants were now proceeding to fill it up.

*Held*, that though the plaintiff could not prevent the filling up of the subway, he was entitled to damages for his property in the easement.

The plaintiff was entitled to assume that there was a reservation of the subway in the deed from the original grantor of the right of way to the railway company, which deed was lost, or he was entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as of right.

*Clouse v. Canada Southern R. W. Co.*, 4 O. R. 28, 11 A. R. 287, 13 S. C. R. 139, distinguished. *Wells v. Northern R. W. Co.*, 594.

4. *Defective construction—Negligence—Condition limiting liability—Validity of—42 Vic. ch. 9, sec. 25 (D.)—Misdirection.*—By sec. 25, of 42 Vic. ch. 9 (D.), which is headed "Working of the Railway," it is enacted that the trains shall be started and run at regular hours, &c. and shall furnish accommodation for transportation of goods and passengers, &c., which are to be taken, trans-

ferred and discharged at, from, and to such places on the due payment of the due tolls, freight and fares, &c.; and the party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or its servants.

The roadbed of the defendants' railway was on an embankment about fifteen feet high, built on the side of a rock which sloped into a muskeg or small lake, the embankment, it was alleged, being made by the side of the rock being filled in with loose sand, which had no cohesion, and without any retaining wall to keep the sand from slipping. The sand slipped off the side of the rock into the muskeg, and the train on which the plaintiff was travelling was thrown into the cavity caused thereby, and took fire, and the plaintiff's baggage was burnt. This part of the road had been built by contractors under the Government before the defendants acquired the road; and it was not shewn that the defendants had any notice or knowledge of the defect.

The plaintiff was travelling on the train from Ottawa to Winnipeg on a ticket procured at the company's office at Ottawa. When she went to get the ticket she asked for and obtained a return ticket, which had a condition limiting the company's liability to a sum not exceeding \$100. The agent, at the time, requested the plaintiff to sign her name to the ticket, and, on plaintiff asking the reason, the agent said it was for the purpose of identification, the ticket not being transferable.



The plaintiff accordingly signed her name to the ticket. The ticket was issued at a reduced rate in consideration of the plaintiff's agreement to the condition, but plaintiff was not informed, nor had she any knowledge of this, nor of the condition limiting the company's liability; and she said she had not read the ticket because her eyes were sore, and she was unable to do so. It was, however, some hours in her possession before starting on her journey.

*Held*, [ROSE, J., dissenting], that sec. 25 only applied to negligence in the management of the train, or handling of goods during their transport, or at the point of receipt or delivery, and not to a defective construction of the road, and therefore defendants could avail themselves of the condition, which was one they were competent to make, and the plaintiff must be bound by.

*Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197; 10 A. R. 162; 11 S. C. R. 612, commented upon.

*Per* CAMERON, C. J.—The road not having been built by the defendants, they were not chargeable as an act of negligence with a defect in the original construction, without direct notice that it was not properly built.

*Per* CAMERON, C. J., also,—Even had there been actionable negligence it was competent to the company in consideration of a reduced rate, to limit their liability.

*Per* ROSE, J.—The damage was caused by negligence in the construction of the road, or from want of repair of the road bed, and being so caused the defendants could not limit their liability.

*Per* GALT and ROSE, JJ.—There was evidence of negligence to go to the jury; and, *Per* CAMERON, C. J. If the defendants could, under the

circumstances, be liable for faulty construction, he was of opinion there was such evidence.

*Fawcett v. Great Western R. W. Co.*, 1 Moo. P.C.N.S. 101, followed.

The learned Judge at the trial charged the jury that unless the plaintiff's attention was drawn to the ticket "sufficiently to make her understand that she was signing something more than ordinary with passengers obtaining a ticket to go to some particular place and return," then she was not bound by it. *Sem-ble*, this was misdirection. *Bate v. Canadian Pacific R. W. Co.*, 625.

### RECEIVER.

*Demurrer—Action in favor of receiver.*—S. recovered a judgment against S. S. and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate which he was entitled to under the will of the latter. The share not being paid over plaintiff brought action in his own name against his father's executors to recover the amount. The defendants demurred on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action.

*Held*, that the right of action was in S. S. and not the plaintiff; by his appointment the plaintiff became entitled to receive the amount, and the defendants, the executors, having notice of his appointment could not safely pay over the money to any other, and in case of their refusal to pay, the plaintiff's duty was to apply for leave to bring an action in S. S.'s name.

*McGuin v. Fretts*, 13 O. R. 699, cited and followed. *Stuart v. Grough et al.*, 255.

## RECOVERY OF LAND.

*Trial of action after unsuccessful demurrer—O. J. A. 1881, sec. 44—Action for recovery of land—Onus—Admissions in pleadings—Estoppel by conduct—Advertisement of sale of lands under execution.*]—Where a statement of claim in an action for the recovery of land was held good on demurrer, and upon the case going down to trial, the plaintiff proved all the material allegations in it.

*Held*, that he was thereupon entitled to judgment, and that O. J. A. 1881, sec. 44, did not apply, and an objection that the plaintiff had not sufficiently proved his title could not be entertained.

*Johnasson v. Bonhote*, 2 Ch. D. 298, distinguished.

Where, in an action for recovery of lands by M., who had bought them at a sale under execution against J. K., it was objected that he had failed to prove that J. K. had, at the time of such sale, any title to the said lands.

*Held*, that it was no answer to this objection to say that the defendant had, in setting up certain facts "by way of a further and separate defence," alleged that J. K. was the patentee of the lands in question, for that such an allegation could not be made use of by the plaintiff to satisfy any defect in his evidence to prove his case, the burden of which rested on him by reason of the said defendant having pleaded possession in herself and her tenants.

*Held*, also, that the fact that in the course of certain prior proceedings had by M. on an execution against A. K., the wife of J. K., for the purpose of selling the said lands, M. had then asserted that they belonged to her, did not estop M. from

now, as against J. K. and A. K., alleging that they belonged to J. K.

Fraud is necessary to the existence of an estoppel by conduct, and a representation to form such an estoppel, must have been made to one ignorant of the truth, and by one with knowledge of the facts.

Where an advertisement of the sale of lands by a sheriff under writs of execution, stated that the sheriff had seized and taken them in execution, and that they or the right and interest of the judgment debtor therein would be offered for sale,

*Held*, that this was sufficient; and that it was not necessary for the advertisement to define more particularly the nature of the estate or interest to be sold. *McGee v. Kane*, 226.

---

## REGISTRATION.

*Of trade mark.*]—See TRADE MARKS.

---

## REMUNERATION.

*Of officer of company.*]—See COMPANY.

---

## RELEASE.

*Of endorser.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

---

## REPLEVIN.

1. *Replevin bond—Delay of plaintiff in replevin action—Postponement of trial—Change of venue in replevin in County Court—R. S. O. ch. 53 sec. 23—R. S. O. ch. 50 sec.*

155—*Notice of exception to pleading.*]—The trial of an action of replevin in a County Court was, by a Judge's order, on the application of the plaintiff therein, postponed to the next sittings thereof, and subsequently the action was by Judge's order transferred to another County Court.

In an action on the replevin bond it was *Held*, on demurrer, that the delay being that of the plaintiff in replevin without the consent or connivance and against the opposition of the defendant therein, the sureties to the bond were not discharged.

*Held*, also, that the venue in any action of replevin in a County Court, except for goods distrained, may be changed to any other county under sec. 155 of R. S. O. ch. 50.

A party whose pleading is demurred to may still serve a notice of exception to the pleading of the opposite party. *O'Donnell v. Duchenaault et al.*, 1.

2. *Action against sheriff for taking insufficient bond—Damages, recoverable therein—R. S. O. ch. 53, sec. 11.*—In this case the judgment reported in 13 O. R. 556, was affirmed with costs. *Norman v. Hope*, 287.

## RES JUDICATA.

See PATENT OF INVENTION.

## SALE OF GOODS.

*Contract—Implied warranty that goods shall be in a merchantable condition—Inspection—Caveat emptor—Damages.*]—Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not

only, in fact, answer the specific description, but must be saleable or merchantable under that description.

On a sale of goods when the buyer has no opportunity of inspection, the maxim *caveat emptor* does not apply.

The plaintiffs sold a cargo of rye to the defendants to be shipped from K. and delivered afloat at the defendants' dock at T. On being unloaded at T, into the defendants' elevator, it was discovered by the defendants' inspector that the bottom of the cargo was heated; and subsequently the whole of it became heated. There was no opportunity to inspect the rye at the time of the making of the contract, nor did the defendants waive inspection. There was no express warranty as to quality or condition.

*Held*, that there was an implied warranty on the part of the plaintiffs that the commodity delivered would be saleable or merchantable under the description "rye;" that there was a breach of such warranty; and that the maxim *caveat emptor* did not apply.

*Jones v. Just*, L. R. 3 Q. B. 197, cited and followed; *Borthwick v. Young*, 12 A. R. 671, distinguished.

The breach of warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract, and it forms no defence to an action by the seller for the price; but the purchaser, on being sued for the price, is allowed to give evidence of the breach of warranty in reduction of damages. *Mooers et al. v. Gooderham et al.*, 451.

## SALE OF LAND.

1. *Conditions of sale—No deeds to be produced other than those in the vendor's possession—Vendor and pur-*

chaser.] — By written agreement for the purchase of land it was provided “no title deeds, abstracts, or evidences of title to be required other than those in the vendor’s possession, or shall the vendor be required to give a covenant for the production of the same.”

*Held*, that under this condition the vendor was relieved from the absolute obligation of making a good title to the land; while if the evidence of title coupled with the abstract, and it may be the public register, did not disclose and prove a good title, the purchaser was not bound to complete, but in that event the vendor would not be liable for damages because of the above condition. *McIntosh v. Rogers*, 97.

2. *Vendor and purchaser—Equitable interest in proceeds of lands under a trust for sale—Fi. fa. against lands.*]—Trustees under the will of F. S. holding certain lands by virtue thereof on trust to sell as soon as conveniently might be after her decease, and distribute the proceeds among her children, one of whom was D. V. L., contracted to sell the said lands to one H. T. There were at the time writs of *fi. fa.* against the lands of D. V. L. some of which had been placed therein before the date of the said contract.

*Held*, nevertheless, that the said writs did not form any incumbrance on the lands in the hands of the trustees so as to prevent them conveying the same to a purchaser indefectibly, and that any share of the purchase money which D. V. L. was entitled to he would get as personal, not as real estate.

*Held*, also, that the purchaser was not bound to see to the application

of the purchase money. *Re Lewis and Thorne*, 133.

3. *Power of sale—Jurisdiction to restrain imprudent sale—Trustees—Sale without reserve.*]—*Held*, that the Court has jurisdiction to prevent trustees about to sell property under a power or trust for sale, from selling in an imprudent and improper manner; and thus in this case where it appeared that although *cestuis que trustent* representing five-sixths of the property desired a sale without reserve, the interest of the remainder would be prejudiced by so selling, an injunction was granted to restrain such trustees from selling without a reserve bid. *Downey v. Dennis*, 219.

4. *Mistake—Misrepresentation—Deed—Assignment of mortgage—Innocent purchaser—Duty of enquiry.*]—P. P. mortgaged certain lands to J. H. as security for \$2,100 and interest, who left the mortgage with E. G. P., a solicitor, for safe keeping. Afterwards K. E., a client of E. G. P., sold his farm to his own son for \$1,700, who, through E. G. P., procured the advance of the purchase money from a Loan company on mortgage, and the money being transmitted to E. G. P., the latter retained it, and handed to K. E. as security for it what purported to be an assignment of the mortgage from P. P. to J. H., executed by J. H., which K. E. registered.

J. H. now brought this action, denying the validity of the said assignment and claiming the removal of it as a cloud upon her title, and for payment of the mortgage by P. P., or on default a sale of the land. K. E. set up the defence of a *bona fide* purchase by him of the said mortgage without notice.



*Held*, that inasmuch as it appeared that J. H. executed the assignment upon a misrepresentation of its nature, character, and contents, believing it only to provide for an extension of the term of payment of the mortgage held by her, the assignment was void, even in the hands of an innocent holder and should be cancelled. There being no transmission of estate legal or otherwise, there was no basis on which to found a defence of purchase for value.

*Held*, also, that under the circumstances, the transfer of the mortgage to K. E. was not carried out in such a way as to make him a purchaser for value of it, inasmuch as K. E. who dealt solely with E. G. P. in the matter, knew he was paying no money which could possibly go to satisfy J. H., but was taking the assignment as security for the money due from his son to him, and therefore had no reason to trust to any statement in the assignment that J. H. had been paid her mortgage money, and was not justified in accepting the assignment without the privity of J. H.; and therefore on this ground J. H. was entitled to relief by way of lien for the mortgage money.

Doctrine of *Ex parte Swinbanks*, 11 Ch. D. 525, applied. *Herchmer v. Elliott et al.*, 714.

---

### SEPARATE ESTATE.

*See* HUSBAND AND WIFE, 3, 4.

---

### SERVANT.

*See* MASTER AND SERVANT.

### SERVICE.

*Of summons on wife for husband.*]  
—*See* TAVERNS AND SHOPS.

---

### SET OFF.

*See* COMPANY.—HUSBAND AND WIFE, 4.

---

### SETTLEMENT.

*See* HUSBAND AND WIFE.

---

### SHERIFF.

*Action against for taking insufficient bond.*—*See* REPLEVIN, 2.

---

### SHIPPING.

*See* BILL OF LADING.

---

### SLANDER.<sup>1</sup>

*See* DEFAMATION, 1.

---

### SPECIFIC PERFORMANCE.

*See* FRAUDS, STATUTE OF.

---

### STATUTE OF LIMITATIONS.

*See* LIMITATIONS, STATUTE OF.

---

### STATUTES.

13 Eliz. ch. 5.]—*See* VOLUNTARY CONVEYANCE.

14 Geo. III. ch. 78, sec. 83.]—*See* INSURANCE, 3.

2 W. & M. sess. 1 ch. 5, sec. 5.]—*See* DISTRESS.

B. N. A. Act, sec. 91, Art. 21.]—*See* CONSTITUTIONAL LAW.

B. N. A. Act, sec. 92, items, 4, 8, 16.]—*See* CANADA TEMPERANCE ACT 1878, 4.

31 Vic. ch. 94, sec. 2 (D.)]—*See* EXTRA-DITION.

32 & 33 Vic. ch. 31 (D.)]—*See* CANADA TEMPERANCE ACT, 1878, 1—CRIMINAL LAW, 1.

36 Vic. ch. 44, sec. 36 (O.)]—*See* INSURANCE, 2.

37 Vic. ch. 91 (O.)]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

40 Vic. ch. 25, sec. 9 (D.)]—*See* EXTRADITION.

R. S. O. ch. 24, secs. 10, 11, 12.]—*See* CROWN LANDS.

R. S. O. ch. 46, sec. 31.]—*See* SUCCESSION COURTS.

R. S. O. ch. 50, sec. 155.]—*See* REPLEVIN, 1.

R. S. O. ch. 53, secs. 11, 23.]—*See* REPLEVIN, 1, 2.

R. S. O. ch. 102.]—*See* DEED.

R. S. O. ch. 104.]—*See* DEED.

R. S. O. ch. 105, secs. 41, 43.]—*See* PARENT AND CHILD.

R. S. O. ch. 107, sec. 3.]—*See* MORTGAGE.

R. S. O. ch. 109.]—*See* MORTGAGE—RAILWAY AND RAILWAY COMPANIES, 1.

R. S. O. ch. 118.]—*See* BANKRUPTCY AND INSOLVENCY, 1.

R. S. O. ch. 125, secs. 5, 7.]—*See* HUSBAND AND WIFE, 3.

R. S. O. ch. 136, sec. 12.]—*See* INSURANCE, 3.

R. S. O. ch. 142, secs. 40, 46.]—*See* MEDICAL PRACTITIONER.

R. S. O. ch. 165.]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

R. S. C. ch. 181.]—*See* CANADA TEMPERANCE ACT, 1878, 4.

41 Vic. ch. 14 (O.)]—*See* CANADA TEMPERANCE ACT, 1878, 4.

42 Vic. ch. 9, sec. 25 (D.)]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

42 Vic. ch. 9, sec. 27 (O.)]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

42 Vic. ch. 16 (D.)]—*See* CRIMINAL LAW, 1.

42 Vic. ch. 22, sec. 1 (O.)]—*See* HUSBAND AND WIFE, 6.

42 Vic. ch. 22, secs. 6, 8 (D.)]—*See* TRADE MARKS.

43 Vic. ch. 4, secs. 1, 2, 3 (O.)]—*See* CROWN LANDS.

44 Vic. ch. 27 (O.)]—*See* CANADA TEMPERANCE ACT, 1878, 4.

O. J. Act, 1881, 44 Vic. ch. 5, sec. 44 (O.)]—*See* RECOVERY OF LAND.

46 Vic. ch. 18, secs. 333, 335, 340, 570, 584, 570, 581, 589 598, (O.)]—*See* MUNICIPAL CORPORATIONS, 1, 2, 3.

Imp. Act, 46 Vic. ch. 57, secs. 64, 70.]—*See* TRADE MARKS.

47 Vic. ch. 34 (O.)]—*See* CANADA TEMPERANCE ACT, 1878, 4.

47 Vic. ch. 36, sec. 7 (D.)]—*See* CRIMINAL LAW, 1.

47 Vic. ch. 39, sec. 15, sub-sec. 1 (O.)]—*See* MASTER AND SERVANT, 1.

48 Vic. ch. 26, sec. 2 (O.)]—*See* BANKRUPTCY AND INSOLVENCY, 1, 2.

49 Vic. ch. 4, sec. 7 (D.)]—*See* CANADA TEMPERANCE ACT, 1878, 3.

49 Vic. ch. 19 (O.)]—*See* HUSBAND AND WIFE, 3.

49 Vic. ch. 28, secs. 3, 7, 10 (O.)]—*See* MASTER AND SERVANT, 2.

R. S. C. ch. 106.]—*See* CANADA TEMPERANCE ACT, 1878, 3.

R. S. C. ch. 129, sec. 77, sub-sec. 2, secs. 83, 86, 87, 93.]—*See* COMPANY.

R. S. O. ch. 161, sec. 4.]—*See* CRIMINAL LAW, 2.

R. S. C. ch. 178, sec. 28.]—*See* CANADA TEMPERANCE ACT, 1878, 3.

50 Vic. ch. 33., O.]—*See* CANADA TEMPERANCE ACT, 1878, 4.

## STATUTORY CONDITIONS.

*See* INSURANCE, 1.

## STREET.

*Altering grade of—Necessity for by-law.*]—*See* MUNICIPAL CORPORATIONS, 5.

*See* MUNICIPAL CORPORATIONS, 2.

## SUBWAY.

*See* RAILWAYS AND RAILWAY COMPANIES, 3.

## SUMMONS.

*Names of magistrates in.*]—*See* CANADA TEMPERANCE ACT, 1878, 1.

*See* CANADA TEMPERANCE ACT, 1878, 3.

## SURETY.

*See* PRINCIPAL AND SURETY.

## SURROGATE COURTS.

*Mandamus—Surrogate Judge—Grant of administration—Jurisdic-*

*tion—Verdict of Jury—Issue to try validity of will—R. S. O. ch. 46, sec. 31.*]—A mandamus was directed to issue to compel the Judge of the Surrogate Court of the County of Wellington, to grant administration with the will annexed of a certain testator to G. D., one of the next of kin (who had filed the necessary papers), notwithstanding that an issue directed out of the said Surrogate Court a jury had found against the will. It appeared that the present applicant was no party to that issue, and that since the trial of it this Court had held in favor of the will.

*Held*, also, that this was not a case for an appeal from the refusal to grant administration under the 31st section of the Surrogate Court Act, because an appeal under that section would appear to be granted only when some one contests the grant of administration, which no one was doing here.

*Semble*, that this Court has jurisdiction to declare a will valid. *Dickson v. Monteith et al.*, 719.

## SURVIVORSHIP.

*See* WILL, 1, 3.

## TAVERNS AND SHOPS.

*Intoxicating liquors—Indians, selling liquor to—Sale by wife—Service on wife—Conviction of husband—Jurisdiction of Indian agent—Order preventing action against magistrate—Power of single Judge to quash conviction—Appeal to Divisional Court.*]—An information for selling liquor to certain named Indians, but without describing them as of any particular tribe or locality,

was laid by R. of the township of Rama, before D. M., described as "an indian agent by Royal Authority duly appointed," and alleged that defendant and Fanny, his wife, or one of them, did on, &c., sell, &c., to the said indians contrary to the statute, &c. The summons issued thereon described D. M. as Indian agent, and shewed it was issued at Rama township. It was directed to the defendant and his wife described as of Rama township, and was personally served on the wife, and a copy left with her for her husband at their most usual place of abode. This was proved by affidavit of service. The enquiry was held at Rama before D. M. as Indian agent, and he subscribed the different depositions as "Indian agent of the Chippewas of Rama," *ex officio* Justice of the Peace. The conviction was that on, &c., "at Rama Indian Reserve, in the township of Rama," the defendant "is convicted before D. M., Indian agent for the Chippewas at Rama, *ex officio* Justice of the Peace for the purpose and under the Indian Act 1880, for that he did on, &c., at the township of Rama, unlawfully sell to certain indians, &c." The warrant of commitment recited that the conviction was before D. M., as Indian agent of the county of Ontario. The liquor was sold at defendant's hotel, in the township of Rama, by the defendant's wife, the husband being away at the time and for some time afterwards. There was nothing said to D. M. to shew why defendant was not present at the enquiry; and D. M. had no reason to believe that the case was other than a neglect or refusal to attend. In support of this application, defendant stated that he knew nothing of the summons having been issued, or of the proceedings

thereon, and never authorized any one to act for him.

*Held, per, WILSON, C. J.*, that the service was regularly made, and duly proved before the Indian agent, and he was justified in proceeding to investigate the charge; and that the act of the wife was in law that of the husband, and that he could be convicted therefor.

*Quere*, whether D. M.'s appointment was as an Indian agent of the Chippewas of Rama, or for the county of Ontario, but the latter might include the former and so give jurisdiction.

*Held*, however, the conviction could not be supported, for none of the proceedings showed that the indians to whom the liquor was sold were indians over whom the agent had jurisdiction, as it did not appear they were Chippewa indians, or indians residing within the township or even in the county.

The discharge of the defendant was granted; but the learned Chief Justice directed that, so far as necessary, and he had power to do so, no action should be brought against the Indian agent.

A substantive motion was made before ARMOUR, J., to quash the conviction which was granted, he also directing no action to be brought against the Indian agent.

On appeal to the Divisional Court against so much of the judgments as prevented an action being brought, the appeals were quashed. *Quere*, whether a single judge has power to hear such motions to quash convictions. If he has power his decision is final, and not appealable. If he has no power, then his action is of no avail, and still unappealable. *Regina v. McAuley*, 643.



**TENANT.***See* LANDLORD AND TENANT.**TENANT FROM YEAR TO YEAR.***See* LANDLORD AND TENANT.**TIMBER.***See* CROWN LANDS.**TRADE MARKS.**

*Publici juris*—Combination—Monogram seal—Comparison of English and Canadian trade-mark Acts—Definition of trade-mark—Colour—Registration before action—Account of profits—Prior user—User in foreign country—Assignment—Goodwill—Hypothetical defence—42 Vic. ch. 22 (*D.*), secs. 6, 8.]—Words which are separately *publici juris*, such as 'Red' and 'Seal,' when combined and applied to a specific manufacture may cease to be so, and may well be protected as trade-marks. Single or more letters may also form a trade-mark, and more especially when combined, woven, or introduced into a monogram.

A common seal of wax to be used on a cigar box is a good trade-mark when within the terms of 42 Vic. ch. 22 (*D.*), the Trade-mark and Design Act, 1879.

The Dominion Trade-mark and Design Act, 1879, defines "trade-mark" in more general and comprehensive terms than the English Act 46 Vic. ch. 57, sec. 64, and some care must be used in considering English decisions.

Under the English Act a trade-mark may be registered in any  
101—VOL. XIV. O R.

colour, and the registration confers on the registered owner the exclusive right to use the same in that or any other colour; and *semble*, our own Act has as extensive an application.

The fact that a plaintiff has brought an action for infringement before registering his trade-mark, which action has therefore proved abortive, does not prevent him bringing another action after registering.

*Semble*, the inability to sue for the infringement of a trade-mark before registration only applies where the infringement has been done innocently, and not to the case of fraudulent imitation or forgery of trade-marks.

The account of profits in an action for infringement should not be confined to the period subsequent to registration, at any rate when the infringement has not been innocent.

By prior user the Trade-mark and Design Act, 1879, 42 Vic. ch. 22, sec. 6 (*D.*), means user before adoption by the registrant, not before registration.

User of a trade mark in a foreign country is no justification for an infringement in the country where the action is brought.

There is no provision in our Trade-mark and Design Act, 1879, similar to sec. 70 of Imp. Act, 46-47 Vic. ch. 57, which provides that a trade-mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods for which it has been registered.

*Quere*, whether hypothetical defences can be pleaded. *Smith v. Fair*, 729.

**TRIAL.**

*Postponement of.*]—*See* REPLEVIN.

**TRUSTS AND TRUSTEES.**

*Parol evidence of—Sufficiency—Statute of Frauds—Mortgage registered without notice of trust.*—In an action for the possession of lands under a mortgage by defendant's brother W., and the foreclosure thereof, the defendant claimed under a trust of the lands by W. in his favour; and also a title by possession. The trust was a parol one, namely, that W. should procure a lease of the lands for defendant, who was then under age, from the Canada Company, the lease apparently containing a right of purchase; and should afterwards pay the purchase money and take the deed in his, W.'s, name, and hold it until defendant became well when he was to transfer it to the defendant, he having been ill at the time. The defendant paid the money for the lease and the purchase money for the land.

*Held*, that the parol evidence was not sufficient to support the trust; but, in any event, as the trust was to be enforced against W. and his grantee's it could not prevail against plaintiffs, mortgage, it having been registered without notice of the trust.

*Held*, also, that the evidence failed to establish a title by possession. *Bank of Montreal v. Stewart*, 482.

*Breach of trust.*—See COMPANY.

*Declaration of trust.*—See HUSBAND AND WIFE, 5.

*Creation of.*—See PARTNERSHIP, 2.

*Power of sale.*—See MORTGAGE, 2, 3.

*See PATENT OF INVENTION—SALE OF LAND*, 2, 3.

*See* WILL, 3, 4.

**ULTRA VIRES.**

*See CANADA TEMPERANCE ACT*, 1878, 3, 4.—*CRIMINAL LAW*, 2.

**VENDOR AND PURCHASER.**

*See MORTGAGE*, 3. — *SALE OF LAND*.—WILL, 2.

**VENUE.**

*See* REPLEVIN.

**VERDICT.**

*See* SURROGATE COURTS.

**VESTING.**

*Period of.*—*See HUSBAND AND WIFE*, 1—WILL, 1, 8.

**VOLUNTARY CONVEYANCE.**

*Subsequent creditor—Antecedent debt—13 Eliz. ch. 5—Statute of Limitations.*—A subsequent creditor cannot uphold an action to set aside a voluntary conveyance under 13 Eliz. ch. 5, merely on the ground that a debt of prior date to the conveyance is still unpaid, if such prior debt has become barred by lapse of time. *Struthers v. Glennie*, 726.

*See HUSBAND AND WIFE*, 5.

**WAIVER.**

*See* CANADA TEMPERANCE ACT, 1878, 2.

**WARRANTY.**

*See* SALE OF GOODS.

**WAYS.**

*See* MUNICIPAL CORPORATIONS, 2, 5.

**WEIGHTS AND MEASURES.**

*See* CRIMINAL LAW, 1.

**WIFE.**

*See* HUSBAND AND WIFE.

**WEEK.**

*Computation of time.*—*See* CANADA TEMPERANCE ACT, 1878, 2.

**WILL.**

1. *Construction—Period of distribution—Survivor of class attaining majority—Gift of maintenance—Duration of—Vesting.*—C. devised the residue of his real estate to his executors in trust for his four children (naming them) “until they or the survivor or survivors of them shall have attained the age of 21 years, said real estate to be divided amongst the said four children share and share alike; and in case any of them shall have died leaving issue, the said issue shall take the share

which otherwise would have gone to his, her, or their parent.” He also directed that his executors should provide for the maintenance, support, and education during their minority out of the income of his residuary property. He also directed his executors to invest all surplus moneys in their hands from time to time “during the infancy of my last mentioned four children, and upon the youngest of them, or the survivor or survivors of them, attaining the full age of twenty one years to divide the said personal share and share alike between them and the survivor or survivors of them,” and that they should upon any of his said children attaining twenty-one advance such sum out of the share of such child as might be desirable for establishing him in some business or professional pursuit. He further directed that any posthumous child should take an equal share of his real and personal estate with his said four children, and be treated in every respect as the others. He further willed all the residue of his personal estate to his executors in trust for his said four children, share and share alike to be divided at the same time the division of the real estate should take place.

*Held*, that the words “until they or the survivor or survivors of them attain twenty-one” meant until the youngest survivor of the children attained that age, and that the lands were to be held in trust till that period and then divided, that being the period of distribution when the members of the class entitled to share were to be ascertained, and that the gifts of both real and personal estate were contingent upon the beneficiaries reaching that period, whether children or issue of deceased children, and the provision as to

maintenance did not import immediate vesting.

*Held*, also that P. J. C., one of the four children who had attained twenty-one was not entitled to maintenance after that age. *Ryan v. Cooley et al*, 13.

2. *Restraint on alienation—Invalidity—Vendor and purchaser proceedings—Costs.*—By his will P. T., after giving a life estate to his widow devised lands to his son as follows, "that T. T. do inherit the same as his property on the condition that he never will or shall make away with it by any means but keep it for his heirs."

*Held*, on an application under the Vendor and Purchaser Act, that the condition attached to the devise was invalid, being an absolute and unqualified restraint on alienation, and that there being in the opinion of the Court no doubt of the vendor's title, the purchaser should pay the costs of the proceedings. *Re Watson and Woods*, 48.

3. *Construction—"Share and share alike"—Survivors and survivor." Devisees.—Trustees or beneficiaries.*—A testator devised to four nephews and a grand-nephew, their heirs, executors, administrators, and assigns, all his real and personal property, share and share alike, upon trust that they, or the survivors or survivor of them, should out of the same "suitable and well" support his wife during her natural life in as comfortable a position as she was then in with him. He appointed his said four nephews executors of his will. The plaintiff and the defendants, the said devisees and the other defendants were all nephews and nieces of the testator and would have been entitled to share in the

estate in case of the testator dying intestate. The testator's wife died before him.

*Held*, [ARMOUR, J., dissenting], that the devisees took the beneficial interest in the estate, real and personal, share and share alike.

*Per* ARMOUR, J. The creation of a trust in favor of the wife was the sole object of the devise and the testator never intended the devisees to take beneficially. *Ballard v. Storer et al*, 153.

4. *Partition—Devise to trustees upon trust to sell if directed by majority of heirs—Consent of majority—Application by minority for partition.*—J. C. died in 1867, having by his will provided as follows: "And whereas trouble \* \* may arise among my family with regard to the property \* \* on account of its being put out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize at and after twenty years after my death, my trustees \* \* to absolutely sell and dispose of my said property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living, to do so, and not otherwise, &c." In 1887, a meeting of a large majority of those interested was held, and it was decided to sell by public auction.

On an application by the plaintiffs, who were trustees for one of the heirs and represented only a one-sixth share of the property, for the usual order for partition and sale, which was resisted by a majority of the heirs, it was

*Held*, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the



heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted. *Re Dennis, Downey et al. v. Dennis et al.*, 267.

5. *Construction—General intention in favour of a class—Particular intention in favor of an individual—Possession—Devise to possessor without title—Estate tail.*]—One J. McP. lived upon lot 26, of which his father, A. McP., was owner from 1826 till 1878, when he died, leaving twelve children him surviving. A. McP. died in 1841, having by will devised lot 26 to J. McP., but adding: "He is not to sell or dispose of the said lands, nor any of the timber or wood now growing on the said lot; on the contrary, the land is to devolve on the most deserving of his children, according to the discretion of my executors, that is to say, after his own death." In 1869, J. McP. conveyed the north half of lot 26 in fee to the defendant. The executrix of A. McP. made no selection as to who was the most deserving of his children on whom the land should devolve. Nevertheless the plaintiff, a son of A. McP., now laid claim under the above devise to seven-twelfths of the lot, being his own share and six other shares which he had acquired.

*Held*, affirming the decision of Rose, J., that he was entitled to judgment in respect to seven-twelfths of the land, for that J. McP. only took a life-estate under the said will, under which he must be said to have taken, as he did not disclaim the benefit of it, and had not acquired title by possession at the time of his father's death; and though no selection had been made among the children of A. McP., the Court would carry out the general intention in favour of the class by holding that

the estate descended on the twelve children of J. McP.

*Per* BOYD, C.—There was no estate tail given to J. McP. under the will, for (1) "children" in it had its primary meaning of descendants of the first generation only; and (2) the children were not to take as a class, in the first instance, but only those out of that class to be indicated by the executors as the most deserving. *McPhail v. McIntosh*, 312.

6. *Mortgage—Appointment—Time of payment—Interest.*]—A mortgage to secure \$800 on certain lands was made by T. K. to his father. The proviso for payment was that the \$800 was to be paid to the mortgagee's executors or administrators in eight equal annual instalments of 100 each, the first payment to be made one year after the mortgagee's decease, upon trust to pay the same to such person or persons as the mortgagee should by deed endorse on the mortgage, or otherwise by deed direct and appoint; and in default of appointment to his children other than his son John, &c. No appointment was made by deed indorsed on the mortgage, or otherwise by deed. The mortgagee by his will directed that the \$800 should be payable, namely, \$200 to each of his three daughters A., M. and B. and \$100 each to his granddaughter K. and his widow, to be paid forthwith after his death.

*Held*, that the will constituted a valid appointment under the proviso in the mortgage, and that the legatees or appointees under it were entitled to the sums bequeathed to them; but that the time for the payment of the money must be in accordance with the terms of the mortgage.

The mortgage was on a printed statutory form, the proviso was for payment of the \$800, the printed words "with interest," being struck out; but the mortgagor covenanted to "pay the mortgage money and interest and observe the above proviso;" and there were the usual provisos as to distress for arrears of interest, principal becoming due on non-payment of interest, &c.

*Held*, that no interest was payable until after default in the payment of each instalment of principal as it became due. *McDermott et al. v. Keenan et al.*, 687.

7. —*Devise—Next of kin—Period of distribution—Construction—Executor.*]—J. C. died, leaving a wife, and E. C., a daughter. By his will, after giving all his property to his executors to pay the whole income to his wife for life or during widowhood, and after her death or second marriage, to pay the said income to his daughter, E. C., yearly, if she had attained the age of 21, for her life \* \* \*, he provided as follows: "And I hereby empower her, my said daughter, if she come into possession of the said income, and have lawful issue, to make a will bequeathing my said property absolutely to any or all of her said children, then the said property to fall to my next of kin who may be living on this continent;" and further provided, "In case \* \* \* then notwithstanding anything heretofore provided, I will and direct that neither she (Ellen), nor any of her children, shall receive any portion of my property; and in such case my whole property shall be given to my said wife absolutely, or if my said wife at that time be dead, then the property to go to my nearest of kin above provided." The wife died and the daughter, E.

C., attained 21, came into possession of the income and died unmarried without issue, having made a will appointing the plaintiff her executor. In an action by the plaintiff, M., as executor of the daughter, E. C., against W. C. and F. McQ., as executors of the testator, J. C., for the property, which the defendants resisted on the ground that the next of kin of the testator, other than E. C. were entitled to it. It was

*Held*, that the "next of kin" must be ascertained at the death of the testator, J. C., and not at the death of his daughter, E. C., and as E. C. was sole next of kin, and being tenant for life, she had also a remainder in fee expectant on her own death, and contingent upon her dying without issue, and that this was such an interest as would pass by her will, and the plaintiff, as her executor, was entitled to the property. *Mays v. Carroll et al.*, 699.

8. *Legacies—Time for vesting.*]—S. by his will gave four legacies to his daughters in four different clauses each worded as follows: "I bequeath to my daughter——the sum of five hundred dollars." By a subsequent clause he provided: "I also order that should any of my daughters die their portion to be equally divided among the remaining ones." The legacies were charged on his lands. Directions were also given that after a certain farm which he had purchased but not paid for in his lifetime was paid for, and all his debts paid, his two sons E. & A. "shall each pay my daughter M. A. S., the sum of \$50, which she shall receive together with the rent of Lot 126 (from the executors), to apply on her legacy. The other three daughters to be paid in the same manner, E. in one year after M. A.,

&c." A direction was also given, that in case of any of the daughters dying, their funeral expenses were to be paid out of their legacies, and in case of sickness their physician's bill to be paid from the same source.

*Held*, on an appeal from a Master, that these provisions and all others of a like kind in the will, had reference at most to the mode and time of payment of the legacies, and not to the substance of the gift, and that as the testator had not clearly and with certainty expressed the intention that the legacies should not vest until the times for payment, the legacies were given in the ordinary way to vest upon the testator. *Re Stevens, Stevens v. Stevens*, 707.

*Validity of.*]—See SURROGATE COURTS.

### WINDING-UP ACTS.

See—CONSTITUTIONAL LAW.

### WITNESS.

*Calling magistrate as.*]—See CANADA TEMPERANCE ACT, 1878, 1.

### WORDS, CONSTRUCTION OF.

*"Insolvent circumstances."*]—See BANKRUPTCY AND INSOLVENCY, 2, 3.

*"Unable to pay debts in full."*]—See BANKRUPTCY AND INSOLVENCY, 3.

*"Danger of navigation excepted."*]—See BILL OF LADING.

*"Without reasonable doubt."*]—See EVIDENCE.

*"Authenticated."*]—See EXTRADITION.

*"Attested."*]—See EXTRADITION.

*"Unjust and unreasonable."*]—See INSURANCE, 4.

*"General words."*]—See DEED.

*"One month."*]—See MORTGAGE, 3.

*"Share and share alike."*]—See WILL, 3.

*"Survivors and Survivor."*]—See WILL, 3.

### WORK AND LABOUR.

*Building contract—Termination of before completion of work—Evidence of—Right to recover amount due.*]—The plaintiffs were employed by defendant to do the masonry work on a building. During the course of the work defendant refused to pay the full amount then due according to the terms of the contract, and caused plaintiffs delay in not having the joists ready at the proper time for plaintiff's use; and, when asked for more money, told plaintiffs to go on with their work, or, if they would not go on, to leave the building. The plaintiffs thereupon left the work.

*Held*, that the defendant having left it optional with the plaintiffs to proceed or abandon the work, and they having elected to abandon it, were justified in considering the contract at an end, and were entitled to recover the amount then due them. *Clayton et al. v. McConnell*, 608.

### WORKMEN'S COMPENSATION ACT.

See MASTER AND SERVANT, 2.

















